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Supreme Court, U.S.
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In The

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1995

JAMES J. CHIRICO; DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE, *et al.*,

Petitioners,

vs.

TOWNSHIP OF NEWTOWN, EDWARD M. CORSE, an adult individual, LARRY M. COMUNALE, an adult individual, PAUL E. RUSSELL, an adult individual, STEWART SPAHR, an adult individual, SUZANNE MATHES, an adult individual, EDWIN COE WILLIAMS, a/k/a E. COE WILLIAMS, an adult individual, and DELAWARE COUNTY ASSOCIATION OF MUNICIPALITIES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

James J. Chirico, a police officer in the employ of the Township of Newtown, was terminated from his position and also his employment-related sick leave and medical insurance benefits were terminated as well. The Township's Board of Supervisors conducted a hearing and, after that hearing, upheld the termination of Chirico. Chirico invoked the appellate jurisdiction of the State Court of Common Pleas, which affirmed the Township Supervisors' decision. Chirico appealed further to the Pennsylvania Commonwealth Court, which also affirmed the decision, and sought allowance of appeal from the State Supreme Court, which was denied. While Chirico's dismissal was pending before the County Court of Common Pleas, he filed a federal action alleging a deprivation of due process of law. The question presented is:

> I. Whether Chirico had an opportunity to fully and fairly litigate the substance of his federal complaint in the state courts during the process of appealing the Township Supervisors' upholding of his termination from employment.

LIST OF PARTIES

Petitioners are James J. Chirico and Delaware County Lodge No. 27, Fraternal Order of Police.

Respondents are Township of Newtown; adult individuals, Edward M. Corse, Larry Comunale, Paul E. Russell, Stewart Spahr, Suzanne Mathes, and Edwin Coe Williams, a/k/a E. Coe Williams; and Delaware County Association of Municipalities.

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James J. Chirico, *et al.*, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A, *infra*) is unreported. The Opinion of the District Court (Appendix C, *infra*) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 17, 1995. (Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute authorizing a civil action for deprivation of rights, 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Chirico was a police officer in the employ of Respondent Township. Petitioner Delaware County Lodge No. 27, Fraternal Order of Police, was the collective bargaining representative for Petitioner Chirico. The individual Respondents were the Township Manager and Township Supervisors. Respondent Township was the employer.

Petitioners brought this suit against Respondents in August, 1992 in the United States District Court for the Eastern District of Pennsylvania. Chirico and Lodge No. 27 alleged that, *inter alia*, the Respondents had deprived Chirico of due process of law under the Fourteenth Amendment of the United States Constitution, and brought their cause of action under the Civil Action for Deprivation of Rights Statute, 42 U.S.C. § 1983. In their lawsuit, Chirico and the Lodge alleged various constitutional deprivations which occurred in the course of the Township's termination of Chirico's employment as a police officer and his related benefits.

The genesis of this dispute occurred in November, 1990, when Chirico responded to an emergency call while acting in his capacity as a police officer. Chirico alleges that in the course of responding to this incident, he was sprayed with the blood and other body fluids of the medical emergency victim while Chirico was attempting to perform cardio-pulmonary resuscitation (CPR) on the victim. Later, Chirico was advised that the victim may have been infected with Human Immunodeficiency Virus (HIV), which causes AIDS. As a result of this incident, Chirico began to suffer various emotion-related symptoms, for which he sought professional care and treatment. These symptoms, and their underlying diagnosed causes, prevented Chirico from returning to work. Respondent Comunale, the Township Manager, requested medical documentation regarding Chirico's

condition. Chirico provided this medical documentation. A dispute arose concerning whether the documentation was sufficient.

As a result of this dispute, Township Manager Comunale took certain actions with respect to Chirico's employment and his employment-related contractual benefits, which Chirico alleges deprived him of due process. Specifically, Chirico alleges that he was not provided with notice and an opportunity to be heard prior to the termination of his employment and the termination of various employment-related benefits, including, but not limited to, his ability to utilize sick leave and the Township's rescission of his health insurance benefits. After Chirico's medical insurance benefits were terminated, and he was denied the use of further sick leave (although he retained an accumulated balance of sick leave days) a series of hearings were held before the Township Board of Supervisors. A written decision was issued January 3, 1992, purporting to reflect the results of a vote taken on December 30, 1991 by the Board of Supervisors. Among the conclusions of law set forth in that decision were ratifications of the actions of Respondent Township Manager Comunale in determining that Chirico had voluntarily quit the police department; a determination that Chirico's failure to report to work amounted to neglect of duty under the Police Tenure Act of Pennsylvania and, therefore, was a proper basis for termination; a ruling that Chirico's removal from the medical insurance coverage provided by the Township also was ratified and that Chirico possessed no further rights to medical insurance, even under the COBRA law.

Chirico appealed the determination by the Board of Supervisors to the Court of Common Pleas of Delaware County, Pennsylvania. In so doing, Chirico sought appellate review of the Township Supervisors' decision pursuant to the Pennsylvania Local Agency Law, 2 Pa. C.S. § 752. The Common Pleas Court reviewed the record developed at the "municipal level" before

the Township Supervisors, considered the argument of counsel, and denied Chirico's appeal. The Common Pleas Court specifically found that the Findings of Fact entered into by the Township Supervisors were supported by substantial evidence and that no error of law was committed. Accordingly, the Common Pleas Court affirmed the adjudication of the Township Supervisors.

Chirico then sought further appeal pursuant to 42 Pa. C.S. § 762(a)(4), before the Commonwealth Court of Pennsylvania. The Commonwealth Court affirmed the Common Pleas Court's decision. Chirico then sought allowance of appeal from the Pennsylvania Supreme Court, which was denied. Chirico's federal action, from which this Petition for a Writ of Certiorari arises, was filed in August, 1992, during the pendency of his appeal before the County Court of Common Pleas. Chirico invoked federal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3), as well as pendant jurisdiction of his state law claims pursuant to 28 U.S.C. § 1367(a).

Following the Pennsylvania Supreme Court's denial of allowance of appeal, the federal District Court granted summary judgment in favor of Respondents and dismissed Petitioner's federal claims. (Appendix C hereto). Petitioners appealed in a timely fashion to the United States District Court for the Third Circuit, which affirmed (Appendix A hereto) based upon the principles that issue preclusion and claim preclusion both applied because Chirico raised, or could have raised, the issues in his federal action during the pendency of his state court appeal.

The question presented here is whether Chirico raised, or could have raised, in his state court appeal the claims and arguments which he presented before the federal court in his action under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE LAW ENUNCIATED BY THE SUPREME COURT IN *LOUDERMILL*, AND ITS PROGENY, AS DEVELOPED IN PENNSYLVANIA.

The right upon which Chirico relies is established in the Fourteenth Amendment of the United States Constitution, which states that no state shall deprive any person of life, liberty, or property, without due process of law. Congress provided persons who suffered such a deprivation with a right to civil action under the Civil Rights Act. 42 U.S.C. § 1983.

As a public employee and a member of a collective bargaining organization, Chirico possessed a property right in the form of a legitimate expectation of continued employment. This right was rooted not only in the collective bargaining agreement, to which his representative organization was a party (Complaint, Exhibit A), but also was protected by statute, specifically, the Pennsylvania Police Tenure Act. 53 P.S. § 811, *et seq.*

The rights of Chirico, Pennsylvania police officers, and others similarly situated were crystallized by this Honorable Court in the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, this Honorable Court noted that property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*, at 538, quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Similar to *Loudermill*, Chirico's rights rest upon the Police Tenure Act, which specifically states:

§ 812. Removals

No person employed as a regular full time police officer in any police department of any township of the second class, or any borough or township of the first class within the scope of this act, with the exception of policemen appointed for a probationary period of one year or less, shall be suspended, removed or reduced in rank except for the following reasons: (1) physical or mental disability affecting his ability to continue in service, in which case the person shall receive an honorable discharge from service; (2) neglect or violation of any official duty; (3) violating of any law which provides that such violation constitutes a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; (5) intoxication while on duty. A person so employed shall not be removed for religious, racial or political reasons. A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed.

53 P.S. § 812.

* * *

§ 814. Hearings on dismissals

If the person sought to be suspended or removed shall demand a public hearing, the

demand shall be made to the appointing authority. Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing, which shall be held within a period of ten days from the filing of charges in writing, and written answers thereto filed within five days, and may be continued by the appointing authority for cause or at the request of the accused. At any such hearing, the person against whom the charges are made may be present in person and by counsel. The appointing authority may suspend any such person without pay pending the determination of the charges against him, but in the event the appointing authority fails to uphold the charges, then the person sought to be suspended or removed shall be reinstated with full pay for the period during which he was suspended, and no charges shall be officially recorded against his record. No order of suspension made by the appointing authority shall be for a longer period than one year.

A written record of all testimony taken at such hearings shall be filed with and preserved by the appointing authority, which record shall be sealed and not be available for public inspection in the event the charges are dismissed.

53 P.S. § 814 (emphasis added).

* * *

§ 815. Appeal

> **The suspended or dismissed employe shall have the right to appeal to the court of common pleas of the county in which he was employed.**

53 P.S. § 815.

The Police Tenure Act, similar to the statute at issue in *Loudermill*, plainly supports the conclusion that Chirico possessed a property right in continued employment. *See Loudermill, supra*, at 539. This Honorable Court acknowledged in *Loudermill* that the principle of "notice and an opportunity to be heard" requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally-protected property interest in his employment. *See Loudermill, supra*, at 542. Although the Police Tenure Act permits a Township to suspend a person sought to be removed without pay pending the determination of the charges against him, 53 P.S. § 814, it does *not* permit the termination of employment or employment-related benefits during the pendency of the attempted removal from employment. Although in Chirico's case the actual hearings on his removal from employment did not conclude until months after notice was given that the Township was seeking to terminate his employment, it was the actions of the Township in the intervening time period which also constituted deprivation of due process. Specifically, the Township did not permit Chirico to avail himself of accumulated sick leave in order to be paid during the time that the issue of his removal was pending. This deprivation occurred notwithstanding the fact that there existed medical documentation of Chirico's inability to return to work due to his emotion-related illness arising from the on-duty incident. Rather, this denial of the use of sick leave was based upon the Township Manager's adoption of a competing medical

report prepared by the doctor to whom the Township sent Chirico for an "independent" medical examination, as opposed to Chirico's own treating psychiatrist.

Further, as this Court noted in *Loudermill*, the right to a hearing does not depend on a demonstration of certain success. *See Loudermill, supra*, at 544, citing *Carey v. Piphus*, 437 U.S. 247, 266 (1978). Therefore, even if the Township Manager chose to accept a competing medical report over the report of Chirico's doctor, he did not possess the authority to terminate Chirico's use of his own accumulated sick leave without affording Chirico a hearing *prior* to such decision. Indeed, this Court, in *Loudermill*, suggested that the pre-termination "hearing" was necessary, but need not be elaborate. *Loudermill, supra*, at 545. The Court also held that due process requires provision of a hearing "at a meaningful time." *Id.*, at 547. A hearing held months later, in which the Township Supervisors ratified the Township Manager's actions, did not constitute due process at "a meaningful time." The Township Supervisors were obligated to conduct a hearing in the absence of any indication by Chirico that he did not wish to avail himself of that right.

The *Loudermill* analysis of this case leads to two discrete issues: whether Chirico was afforded sufficient due process in the form of a pre-termination hearing, and whether any post-termination hearing was tainted by the dual role filled by the ultimate finders of fact.

First, the Commonwealth Court of Pennsylvania applied this Honorable Court' s decision in *Loudermill* to a situation comparable, if not identical, to Chirico's in the case of *Pavonarius v. City of Allentown*, 157 Pa. Commonwealth 116, 629 A.2d 204, 207-208 (1993). Pavonarius was a police officer hired under the Civil Service Provisions of the Pennsylvania Third Class City Code, and possessed a right under that statute to

a hearing prior to termination for misconduct. 53 P.S. § 39408. Although Pavonarius' termination was not sought due to misconduct, but rather because of a medical condition which allegedly prohibited her from fulfilling the duties of the police officer position, the Commonwealth Court nevertheless extended the statutory and constitutional protections to Pavonarius' case by applying this Honorable Court's decision in *Loudermill*. Accordingly, the Commonwealth Court found that, irrespective of the reason for the proposed termination, Pavonarius still possessed a constitutional right to due process in the form of an actual full-blown due process hearing. *Id.*, 629 A.2d at p. 207. Although this Honorable Court found that only a very basic opportunity to respond is required to be afforded to an employee in order to fulfill due process, *Loudermill, supra*, at 546, the Commonwealth Court noted that the affected employee's due process rights were even greater under the Pennsylvania law, and required a "full-blown" hearing. *Pavonarius, supra*, 629 A. 2d at 207. The Pennsylvania Commonwealth Court specifically noted that the Police Tenure Act, 53 P.S. § 811, *et seq.*, contains a similar requirement of a "full-blown" hearing. *Id.*, at 208,

Further, in applying *Loudermill*, the Commonwealth Court in *Pavonarius* noted that Pennsylvania's Local Agency Law also required a full-blown hearing prior to the termination of employment of a police officer for whatever reason. *Pavonarius*, 629 A. 2d at 208, citing the Local Agency Law, 2 Pa. C. S. § 553. Therefore, under the Local Agency Law, due process as enunciated in *Loudermill* is extended in Pennsylvania to include a "full-blown" hearing to challenge the decision to terminate a police officer *prior* to such dismissal. *Id.*, at 208.

Therefore, no termination of Chirico's employment, or his employment-related benefits, could be enacted by the Township (either through its Supervisors or its Township Manager) without

a prior full-blown hearing. In the instant case, Chirico's employment, as well as his employment-related sick leave benefits and medical insurance, were terminated without any such prior hearing. When a hearing was conducted subsequently, the result of that hearing was the Township Supervisors' retroactive ratification of the property deprivations. This retroactive ratification is contrary to this Honorable Court's decision in *Loudermill,* and its progeny in Pennsylvania, *Pavonarius.*

Due process considerations also arose from the participation of the Township Supervisors in employment-related decisions affecting Chirico in this matter *prior* to their hearing the case against Chirico as finders of fact under the Police Tenure Act. 53 P.S. § 814. Essentially, Chirico submits that the Township Supervisors' *earlier* ratification of the deprivations committed by the Township Manager, as revealed by the discovery process in the instant federal case, constituted an impermissible commingling of prosecutorial and adjudicatory functions and, therefore, a deprivation of due process.

The record which was established during discovery in the instant federal action indicates that members of the Township Board of Supervisors ratified actions of the Township Manager in terminating Chirico's benefits *prior* to their conducting the hearings on his termination from employment:

> BY MR. GREEN:
>
> Q. The question is, were you ever present at a meeting of the board of supervisors which was not open to the public and at which the continuation of Officer Chirico's employment was discussed?

A. I could answer, yes, but I'd like to qualify it.

Q. Sure.

A. That I'm not sure the question of the continuation of his employment being discussed, but rather I was present at meetings where his situation was discussed. That is, the township manager was reporting to the board of supervisors on ensuing events involving his employment.

Q. When you used the word situation, could you clarify what you mean by that?

A. Well, I'm referring as I suppose you are, to this specific incident which preceded all of the present questions.

Q. Which incident was that?

A. This was an incident in November of 1990.

Q. What do you remember being discussed about that incident?

A. Well, initially, a report by the township manager that there was an incident and that Mr. Chirico was not reporting for work. And in my mind this was merely a report to the board of supervisors on why this patrolman was not reporting for work every day.

Q. Now, you used the —

A. And this is really no different than a patrolman who was sick or injured himself and was just reporting to the board that he was not reporting for work.

Q. Now, you had used the phrase "ensuing events" in your answer. I'd like to know what you meant by that?

A. Reports on where this not reporting to work involved what Mr. Chirico was doing and what the police chief was doing about it and where the township manager was involved.

Q. Do you recall the specifics as to what was reported that Mr. Chirico was doing or what the township manager or the chief were doing?

A. Not specifically in detail, general activities such as doctors' visits and doctors' reports, that sort of thing.

Q. Would it be a fair statement to say that Officer Chirico and types of things that you've discussed, were discussed at more than one private board of supervisors meeting?

A. Oh, yes.

(Dep. of Respondent Williams, attached to Plaintiffs' Motion for Summary Judgment as Attachment 6, pp. 13-15).

This Honorable Court has recognized that the right to a fair and impartial tribunal in the first instance is a cornerstone of our notion of due process. This point was eloquently made in the decision of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and was followed by the Pennsylvania Supreme Court in the case of *Lyness v. Commonwealth of Pennsylvania, State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204, 1210, n.12. In *Lyness*, the Supreme Court of Pennsylvania held that the revocation by the State Board of Medicine of a license to practice medicine and surgery constituted a violation of due process when the Board of Medicine both determined that the license holder be prosecuted and also acted as ultimate fact-finder in determining whether a violation occurred. The Pennsylvania Supreme Court found that where the very entity or individuals, such as the Board of Medicine, are involved in the decision to prosecute and are "significantly involved" in the adjudicatory phase of the proceedings, a violation of due process occurs. *Lyness, supra*, 605 A.2d at 1210. Therefore, the Pennsylvania Supreme Court held, whether or not any actual bias existed as a result of the Board acting as both prosecutor and judge was inconsequential; the potential for bias and the appearance of non-objectivity was sufficient to create a fatal defect under the Pennsylvania Constitution. *Id.*, at 1210. Indeed, Article I, Sections 1, 9 and 11 of the Pennsylvania Constitution provide protections for due process of law as well as the federal protections which exist under the Fourteenth Amendment. *Lyness, supra*, 605 A.2d at 1207.

In *Lyness*, the Pennsylvania Supreme Court relied upon its decision in *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1975), in which it struck down a regulation which vested power in a police commissioner to both initiate court-martial proceedings against a state police officer (a prosecutorial function), and thereafter exercise ultimate judicial determination as to guilt or innocence. *Lyness, supra*, 605 A.2d at 1207. In its *Lyness* opinion, the Supreme Court noted its findings in *Dussia* that the overlap of

prosecutorial and adjudicatory functions, even where not complete, was an anathema to the notion of due process in Pennsylvania. *Id.*, at 1208. Therefore, a mere possibility of bias under Pennsylvania law is sufficient to raise the red flag of protection offered by the procedural guarantee of due process. *Id.* The Pennsylvania Supreme Court noted its earlier decision in *Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969), in which it invalidated a procedure whereby the same individual was a member of the Fire Board which brought the initial complaint against a police officer, and also a civil service commission which heard the officer's appeal, thereafter suspending him. *Lyness, supra*, 605 A.2d at 1208. In *Lyness*, the Pennsylvania Supreme Court noted that what the Pennsylvania Constitution requires, however, is that if more than one function is reposed in a single administrative entity, walls of division must be constructed which eliminate the threat or appearance of bias. *Id.*, at 1209. The *Lyness* court noted that only three of the original eight members of the Board of Medicine who initially participated in the decision to prosecute ultimately also sat in judgment as fact-finders. *Id.*, at 1206.

In the case at bar, the very Board which ultimately served as fact-finder was "significantly involved" in the prosecutorial decision which preceded the adjudicatory phase. The fact that the ultimate decision of the Township Supervisors would be submitted to appellate review by the impartial Court of Common Pleas did not vitiate the due process deprivation, because Chirico was entitled to a neutral and detached judge in the first instance. *Lyness* at 1210, citing *Ward*, 409 U.S. at 61-62.

The Pennsylvania Supreme Court's holding in *Lyness* was followed by the Commonwealth Court of Pennsylvania in the case of *Copeland v. Township of Newtown*, 147 Pa. Commonwealth 463, 608 A.2d 601 (1992). In that case, the very same entity, the defendant Township's Board of Supervisors was

found to have improperly commingled prosecutorial and adjudicatory functions with respect to one of its other police officers. The court reasoned that, even if no actual bias existed, the procedure in which the Board of Supervisors suspended a police officer and subsequently heard his appeal created an appearance of impropriety which was an impermissible violation of due process. *Copeland, supra,* 608 A.2d at 602. Therefore, the actions of the Respondent Township Supervisors in the instant Chirico case, and the holding of the Third Circuit Court of Appeals, are contrary to the law enunciated by this Honorable Court in *Ward* and *Loudermill,* as well as those two cases' Pennsylvania progeny developed by the Pennsylvania courts.

II.

THE THIRD CIRCUIT COURT OF APPEALS' DECISION TO APPLY THE PRINCIPLES OF ISSUE PRECLUSION AND CLAIM PRECLUSION IS ERRONEOUS.

Chirico's state court action took the form of a local agency appeal, pursuant to both the Police Tenure Act, 53 P.S. § 815 and the Local Agency Law, 2 Pa. C.S. § 752. The scope of review of a local agency appeal in Pennsylvania is set forth in the Local Agency Law, specifically 2 Pa. C.S.A. §§ 753, 754, which state:

> **§ 753. Scope of Review**
>
> **(a) General rule.**—A party who proceeded before a local agency under the terms of a particular statute, home rule charter, or local ordinance or resolution shall not be precluded from questioning the validity of the statute, home rule charter or local ordinance or resolution in the appeal,

but if a full and complete record of the proceedings before the agency was made such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

(b) Equitable relief.—The remedy at law provided by subsection (a) shall not in any manner impair the right to equitable relief heretofore existing, and such right to equitable relief is hereby continued, notwithstanding the provisions of subsection (a).

2 Pa.C.S.A. § 753.

§ 754. Disposition of appeal

(a) Incomplete record.—In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.

(b) Complete record.—In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing

> the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa. C.S. § 706 (relating to disposition of appeals).

2 Pa.C.S.A. § 754.

As indicated by the Court of Common Pleas' Opinion denying Chirico's appeal (Court of Appeals Appendix, Volume II, pp. 140a-147a), that court acknowledged that it had reviewed the record developed at the municipal level. Because a complete record was made before the Township Supervisors, the Court of Common Pleas' disposition of appeal was governed by § 754(b) of the Local Agency Law. 2 Pa. C.S. § 754(b). Accordingly, the Court of Common Pleas was bound to affirm the Township Supervisors' adjudication unless the Court found that the adjudication was in violation of Chirico's constitutional rights, was not in accordance with law, that the provisions of the Local Agency Law, 2 Pa. C.S.A. § 551, *et seq.*, had been violated in the proceedings before the Township Supervisors, or that any finding of fact made by the Township Supervisors and necessary to support their adjudication was not supported by substantial evidence.

Accordingly, because a full and complete record was made

of the proceedings before the Township Supervisors, the court did not hear the appeal *de novo*, as authorized in such a situation by § 754(a) of the Local Agency Law. 2 Pa. C.S.A. § 754(a). Therefore, the Court of Common Pleas, and the succeeding state appellate courts, in applying their standard of review, did not pass upon the evidence discovered by Petitioner in the course of his federal proceeding. Specifically, the state courts did not have the opportunity to review the testimony of the Respondent Township Supervisor Williams, extracted, *supra*, in which he admitted that the Township Supervisors had participated in, and ratified, decisions involving Chirico's employment and benefits prior to the commencement of the actual hearings under the Police Tenure Act and Local Agency Law.

The element of identity of the thing sued upon, which is a prerequisite to issue preclusion, is not present in this case. The state courts were acting in an appellate capacity, and were subject to a restricted review of the record already established before the Township Supervisors. This is *not* identical to a separate federal cause of action brought forth in federal court based upon constitutional deprivations neither discovered nor discoverable during the course of the local agency proceeding that was subject to state court review. Therefore, the issue of the Township Supervisors' participation in, or ratification of, decisions involving Chirico prior to the actual hearings could not have been raised anew in the Court of Common Pleas' appellate review of the complete record which was made before the Township Supervisors. Accordingly, the Third Circuit Court of Appeals erred in granting summary judgment based upon the principle of claim preclusion.

This case is distinguishable from the *Lyness* case, in that the original complaint in *Lyness* was issued by the State Board of Medicine and was signed by the Chairperson of the Board. *Lyness, supra*, 605 A.2d at 1205. All correspondence in Chirico's

case was generated by the Township Manager. However, it was not until discovery occurred in Chirico's federal case that he learned of the extent of the participation by the Township Supervisors in decisions affecting his employment, including the termination of this employment-related benefits. Those decisions in which the Township Supervisors participated also involved a decision to commence disciplinary proceedings against Chirico. In the *Copeland* case, the Chief of Police requested the Township Manager to discipline the officer under the Township's Police Code. *Copeland, supra,* 608 A.2d at 602. In the instant Chirico case, there was no such request. (Plaintiffs' Motion for Summary Judgment, Exhibit 10, §§ 410.02, 410.04, 430.16, 430.20; Attachment 10, Deposition of Chief of Police Short, p. 9). Thus, although the state courts have determined that there was no deprivation of constitutional rights attendant to the actual proceedings before the Board of Township Supervisors, the state courts did not consider, nor could they consider, the after-discovered evidence of participation by the Township Board of Supervisors in pre-hearing decisions involving Chirico.

Therefore, the federal District Court was the first "trial" court with the opportunity to review and pass upon these pre-hearing actions of the Township Supervisors, unfettered by the narrow constraints of appellate scope of review such as those faced by the Court of Common Pleas and the subsequent reviewing courts of Pennsylvania.

III.

THE ISSUES INVOLVED ARE IMPORTANT.

The foundational due process protections enunciated by this Honorable Court in the *Loudermill* case have been extended and expanded in Pennsylvania both generally (with respect to employees in contractually- or statutorily-protected positions)

as well as to police officers in particular. These extended and expanded protections always were plainly rooted in Pennsylvania statutory law, specifically the Police Tenure Act, 53 P.S. § 811, *et seq.*, and the Local Agency Law, 2 Pa. C.S.A. §§ 551, *et seq.*, 751, *et seq.* However, it is also clear that in Pennsylvania, police officers have not always been afforded their statutorily-established due process rights. For example, the plaintiff in the *Pavonarius* case was terminated from her position of employment based upon a non-misconduct reason (a medical condition which allegedly prevented her from satisfying all of the job requirements). Pavonarius had to proceed through the Pennsylvania courts to the appellate Commonwealth Court, before vindicating her due process rights in a decision which drew heavily from this Honorable Court's decision in *Loudermill.* The Commonwealth Court in *Pavonarius* specifically found that an actual hearing, as opposed to a mere opportunity or offer of an opportunity to be heard, must precede a termination from employment. *Pavonarius, supra,* 629 A. 2d at 207. Further, that hearing must not be perfunctory in nature, but must be a "full-blown" hearing, as required by the Pennsylvania Third Class City Code, 53 P.S. § 39408. *Id.*, at 207-208.

Similarly, Chirico was entitled to a full-blown hearing under the Police Tenure Act. 53 P.S. § 814. Under *Loudermill* and *Pavonarius*, such a hearing must actually be held and must occur prior to the termination of employment or employment-related benefits such as those statutorily-protected benefits possessed by Chirico. Therefore, neither a termination of Chirico's employment, nor an enforced "voluntary quit", nor a decision denying Chirico the right to use accumulated sick days while the issue of his employment was litigated (since that issue surrounded his alleged disability from working), nor the unilateral termination of his medical insurance benefits could be accomplished legally without a full-blown, pre-termination hearing.

Of second, but equally utmost, importance is the due process right a police officer, or other employee similarly situated, possesses to an impartial tribunal to hear the allegations against him. In this case, the Respondent Township Manager usurped the legally-delegated role of the Chief of Police with respect to the institution of disciplinary proceedings against Officer Chirico. Compounding this deprivation of due process was the active ratification and participation by the Township Supervisors in the decisions of the Township Manager to proceed with the disciplinary action. Once the Township Supervisors ratified the actions of the Township Manger, whether or not by formal vote, they became, in effect, disqualified from acting in an adjudicatory function with respect to the subsequent, eventual full-blown due process hearing to which Chirico was entitled.

The importance of this case is clear to police officers in Pennsylvania, or any other employees, who possess a right to due process prior to a termination of employment or employment-related benefits. The "full-blown" hearing must occur, it must be conducted at a meaningful time, and it must be conducted *prior* to any deprivations relating to protected employment and its attendant benefits. Further, this requisite full-blown hearing must be conducted by an adjudicatory person or panel which was not in any way involved in the decision to commence termination or deprivation proceedings against the affected employee.

Further, the importance of this case may result in the provision to constitutionally-deprived employees of an opportunity to investigate the procedures by which their employment was terminated. Since the adjudicator in the Police Tenure Act and similar hearings is, essentially, the employer (presuming, of course, that such employer has not engaged in the decision to commence the proceedings), the first opportunity that an employee has at impartial review of the charges against him is at the appellate stage before the Court of Common Pleas. Once

that stage is reached, the court's discretion is limited to the narrow scope of review set forth in the Local Agency Law, 2 Pa. C.S.A. § 754(a), based upon the record made at the fact-finding stage before the employer agency. Therefore, within the scope of appellate review, the court looks to the record itself, and does not have an opportunity to pass upon subsequently-discovered evidence which may be uncovered through responses to interrogatories and depositions, as in the current case. Therefore, Chirico, and others in the future similarly situated, should not be denied recourse through the federal courts for the purpose of rectifying due process deprivations which are not part of the record before the agency employer, but which, nevertheless, occurred to the employee's ultimate detriment.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectful submitted

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Counsel of Record
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Dated: January 16, 1996

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 17, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1001

JAMES J. CHIRICO; DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Appellants

v.

TOWNSHIP OF NEWTOWN; EDWARD M. CORSE, an adult individual; LARRY M. COMUNALE, an adult individual; PAUL E. RUSSELL, an adult individual; STEWART SPAHR, an adult individual; SUZANNE MATHES, an adult individual; EDWIN COE WILLIAMS, an adult individual a/k/a E. COE WILLIAMS; DELAWARE COUNTY ASSOCIATION OF MUNICIPALITIES

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 92-cv-04956
District Judge: Honorable Marvin Katz

Submitted Under Third Circuit LAR 34.1(a) October 11, 1995

Before: GREENBERG, LEWIS, and ROSENN,
Circuit Judges

Appendix A

MEMORANDUM OPINION

ROSENN, *Circuit Judge.*

Appellant James J. Chirico, a former police officer for the Township of Newtown, appeals from a summary judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the defendants Township of Newtown, Edward M. Corse, Larry M. Comunale, Paul E. Russell, Stewart Spahr, Suzanne Mathes and Edwin Coe Williams. Chirico's complaint alleged that the defendants violated his civil rights, 42 U.S.C. §1983 and §1985, by failing to provide him with a hearing before the termination of his employment and benefits. Chirico also asserted pendent state law claims for breach of contract and infliction of emotional distress. The district court had jurisdiction under 28 U.S.C. §1331. The district court held that Chirico's claims were barred by the doctrines of claim and issue preclusion and absolute and qualified immunity. The plaintiff timely appealed. We affirm.

I.

While on duty in 1991 as a police officer, Chirico and his partner responded to an emergency call on behalf of an unconscious man. Chirico administered cardiopulmonary resuscitation (CPR) to him. As the victim regained consciousness, he suffered a nosebleed and his saliva and blood made contact with Chirico. Later, Chirico was informed that the victim had AIDS or was HIV-positive. Chirico went to a hospital for blood testing; he received a negative report. After two days off with pay, Chirico returned to work and was informed that the victim's blood also tested negative for HIV.

Despite these reassurances, Chirico claimed that he continued to worry about contracting a disease and was too disabled to return to work as a police officer. On November 26, 1990, he reported that he was unable to work because of his emotional condition, although he continued to work as a security guard at Aronimink Golf Club. He saw a psychiatrist two days later. On November 30, 1990, the town manager, Comunale, informed him that his absences would be charged against his accumulated sick leave, which would last through February 14, 1991. After almost two months of absence, the Township, through its manager Comunale, requested a doctor's report showing proof of disability. Comunale further notified Chirico that if he could not prove disability, his employment and benefits would terminate, and that he could request a hearing before their termination. Chirico made no such request. The Township also requested that Chirico submit to a medical examination by an independent doctor. This doctor reported that Chirico was fit for work. Comunale then directed Chirico to return to work by February 14. In response, Chirico submitted a conflicting, cursory statement from his psychiatrist, diagnosing Chirico as to disabled to work. When Comunale informed him that this note was not adequate to evaluate the disability, and that he would be deemed a voluntary quit retroactive to February 14, 1991, Chirico submitted a three-page report from his psychiatrist dated February 21, 1991. On April 15, after reviewing both reports and finding the independent doctor's to be more credible, the town manager retroactively deemed Chirico a "voluntary quit" and terminated his benefits after more than twenty-five years of service.

Chirico then requested a post-termination hearing. During the course of the Township's hearings, Chirico filed a

separate action in the Court of Common Pleas for Delaware County, seeking to compel payment of his Heart and Lung benefits. The court remanded this claim to the Township Board of Supervisors, to be considered as part of the pending termination claims. The Board held that Chirico was not disabled, was not entitled to Heart and Lung benefits, and had properly been treated as a "voluntary quit."

Chirico then appealed his termination of employment and denial of benefits to the County Court of Common Pleas. This court upheld the Township's termination and rejected Chirico's claims of bias on the part of the Supervisors. The Commonwealth Court affirmed the ruling. The court found that the Township did not deny Chirico due process; that he had been offered an opportunity for a pre-termination hearing, but he did not request one. Finally, the Supreme Court of Pennsylvania denied his application for appeal.

With his case pending in the Commonwealth Court, Chirico filed this action in the United States District Court against the Township, its town manager, and the individual members of the Board of Supervisors. He based this suit on a purported violation of his civil rights, claiming that he had been denied his medical benefits without having been provided procedural due process. The defendants moved for summary judgment, which the trial court granted. It held that the issues raised by Chirico in this suit had either already been litigated or could have been litigated in the state court proceedings. Therefore, the district court held that Chirico's claims were barred by claim and issue preclusion. In addition, the court held that the individual Supervisors and the town manager were entitled to immunity for their actions. Chirico appealed.

Appendix A

II.

This court exercises plenary review over a grant of summary judgment. *Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co.*, 989 F.2d 635, 637 (3d Cir. 1993). Summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-32 (1986); Fed.R.Civ.P. 56(c). We agree with the district court that Chirico had an opportunity to fully and fairly litigate his complaint in the state court. As all issues presented in this action were either raised at the state court level, or should have been raised there, this action is precluded.

There are two separate but related concepts of preclusion, which prevent a suit already brought and decided in one court from being litigated again in a new forum. Formerly designated as res judicata and collateral estoppel doctrines, they have since been re-named claim preclusion and issue preclusion, respectively, by the Supreme Court and the Restatement on Judgments. See, generally, Restatement (Second) of Judgments, § 27 and accompanying comments. In this case, the previous judgment which defendants argue is preclusive is a state court judgment. In determining the preclusive effect of such a judgment, we apply that state's laws of claim and issue preclusion. Federal courts must give full faith and credit to the state court judgment under 28 U.S.C. §1738. Full faith and credit also applied to decisions of state administrative agencies that have been reviewed by state courts. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). These standards are equally applicable in Section 1983 actions. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993) (applying Pennsylvania preclusion

law to bar a §1983 case brought following state unemployment compensation decision). Pennsylvania law bars further federal action on Chirico's part[1].

A. Issue Preclusion

Issue preclusion (formerly collateral estoppel) pragmatically bars re-litigation of an issue actually decided in a previous suit. Under Pennsylvania law, issue preclusion requires the following four conditions: (1) identity of the issue in the current and prior action; (2) a final judgment on the merits of the previous action; (3) identity or privity of the current party against whom the issue is asserted with a party to the prior adjudication; and (4) that the party against whom the issue is asserted had a full and fair opportunity to litigate it in the prior action. *See, Gregory v. Chehi*, 843 F.2d 111, 121 (3d Cir. 1988), *citing Safeguard Mutual Ins. Co. v. Williams*, 345 A.2d 664, 668 (Pa. 1975). In this dispute, the state court proceedings went to a final judgment on the merits, Chirico sued in both actions, and fully litigated the issue in the state action. Thus, requirements two, three and four have been fully met[2]. There remains for our determination whether the issues

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1. The district court noted that Plaintiff Lodge No. 27 has no independent basis to assert any claim, and is considered in privity with Chirico for purposes of preclusion. This decision has not been appealed to this Court.

2. Chirico claims that his issues were not, in fact fully litigated, "especially in light of the later-discovered participation and acquiescence of the individual Defendant Supervisors in those decisions prior to the hearing." If there has been newly-discovered evidence, which could not have been found earlier through due diligence of the parties, this situation may, at the judge's discretion, be grounds for relief from judgment, under Fed. R. Civ. P. 60(b). The record does not reflect that such relief was ever attempted in the state court.

(Cont'd)

conclusively determined by the Pennsylvania courts are implicated again by this action.

In the County Common Pleas court, Chirico challenged his denial of Heart and Lung benefits as not supported by the record. He also claimed that the Township denied him due process by terminating his Heart and Lung benefits and sick leave before giving him a hearing. Finally, Chirico claimed that his post-termination hearing deprived him of due process because the Board of Supervisors conducting it knew of and acquiesced in the Township manager's decision prior to commencement of the hearings. The county court affirmed the decision of the Board. Therefore, it considered and rejected these arguments.

On appeal from the Court of Common Pleas, Chirico argued that the Township denied him a pre-termination hearing as required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The Commonwealth Court of Pennsylvania, however, expressly found that Comunale's letter to Chirico of January 18, 1991 offered him the opportunity for a hearing "prior to stoppage of your pay and benefits if you so request." The court also expressly found that there was no evidence in the record that the Board who terminated Chirico had participated in the initial decision. Therefore, it concluded that there was no evidence of a denial of due process.

In this proceeding, Judge Katz carefully and thoroughly

(Cont'd)
Chirico may not use his failure to traverse available procedural avenues as a reason to open new channels in the federal courts for another trial on essentially the same issues.

analyzed the issues of bias, due process and equal protection and held that they had been adjudicated in the Township's favor in state court and are now barred. In addition, the district court noted that the Township afforded Chirico the opportunity for a hearing prior to stoppage of his pay or benefits. This precludes any argument that the Township violated his due process rights because he did not receive a hearing. We agree with this analysis of Chirico's claims. These decisions of the state court cannot be re-litigated in the federal forum.

B. Claim Preclusion

In addition, Chirico cannot now litigate issues which could have been raised in the state action and were not. This is the doctrine of claim preclusion, formerly known as res judicata. In *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), this court applied the doctrine to a fact pattern remarkably similar to Chirico's. The Town Council discharged Gregory, a police officer in the town of Lower Saucon, Pennsylvania, for cause. He argued, however, that his discharge had been in retaliation for his political activities in violation of the First Amendment. Gregory filed a complaint in a state court against the Council members in their individual capacities, claiming: (1) a violation of the Sunshine Law; (2) failure to follow township discipline policy; (3) insufficient evidence; (4) failure to notify the plaintiff of the consequences of his actions; and (5) bias on the part of the Council members. *Gregory v. Chehi,* at 114. The state court affirmed the Council's decision. *Id.*

Gregory then filed a complaint in federal court, alleging a conspiracy between the defendants to deprive him of his due process rights. He raised his First Amendment claim at this

proceeding, as the state court judge had not mentioned it. The court held that, even though the issue had not been "fully and fairly litigated" in the prior proceeding, it was nonetheless barred by the doctrine of res judicata. The court determined that plaintiff's two complaints stemmed from the same transaction or claim[3]. The essence of each cause of action, said the Court of Appeals, "is that he [Gregory] was unlawfully discharged from his employment." *Gregory,* at 118. The federal theories for the discharge could have been advanced in the state action. Since they were not, Gregory could not now re-open the issues by recasting them in federal terms. He was barred. See, Restatement (Second) of Judgments, § 25 (1), comment e ("A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.")

Chirico is in the same position. His federal claims are for denial of his due process rights under §1983 and conspiracy to deprive him of his rights in violation of §1985. As discussed above, the due process claim was decided against him. As for the conspiracy count, the court in *Gregory* held specifically that "claim preclusion may not be evaded simply by adding allegations of conspiracy to the very same activity challenged in the first action." *Gregory,* at 118. The conspiracy claim is

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3. Under Pennsylvania law, claim preclusion requires four elements: identity of subject matter, identity of cause of action, identity of parties to the action and identity of capacity of the parties. *Duquesne Slag Products Co. v. Lench,* 415 A.2d 53, 56 (Pa. 1980).

indistinguishable from the previous cause of action and is therefore barred. The district court entered summary judgment for defendants on all of Chirico's federal claims, noting that these issues are "inextricably tied to the other matters presented in the state court, which were fully and fairly adjudicated against Chirico." We agree.

Chirico argues that his complaint in the instant case against the defendants in their individual capacities is not barred, because they were not parties to the state court action. Claim preclusion does require identity of both parties to the action; issue preclusion, however, may be asserted defensively by one not a party to the first action, as long as the person against whom it is asserted was a party in the previous case. *See, Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 332-33 (1979). In *Gregory,* the court determined that the state court suit had been against the defendant Council members in their official capacities. Therefore, the court permitted a suit against the council members as individuals. *Gregory,* at 120, *see also, Edmundson v. Borough of Kennett Square,* 4 F.3d 186, 189 (3d Cir. 1993) (prior court action against a municipality does not meet identity of parties test for subsequent federal suit against officials in their individual capacities).

Chirico argues that his suit, as well, should be allowed to proceed against the defendants individually. However, Chirico's situation is distinguishable. In *Gregory,* the court allowed the action to proceed only as to Gregory's First Amendment claim, a claim that had been expressly reserved from decision by the state court. In *Edmundson* and in *Kelly v. City of Philadelphia,* 552 F.Supp. 574 (E.D.Pa. 1982), also cited by Chirico for the proposition that his suit against the

individuals may proceed, the courts held that such claims were not barred by prior agency decisions that had not been reviewed by a court. In contrast, all of Chirico's claims were fully litigated, and were heard before a Pennsylvania state trial and appellate court. The defendants as individuals can defensively use the state court finding that Chirico was afforded due process. The state court held that Comunale's letter of January 18 notified Chirico of the opportunity for a pre-termination hearing before stoppage of any pay or benefits, but Chirico failed to request such a hearing. The plaintiff may not now re-litigate endlessly by bringing separate actions for each benefit terminated[4].

III.

Having determined that all Chirico's claims are barred by res judicata or collateral estoppel, we need not reach the issue of whether the town manager and the individual supervisors enjoy immunity from suit for their actions. All of Chirico's claims are barred by the earlier state court judgments, and cannot be brought again in the federal forum.

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4. Judge Katz also held that the members of the Board of Supervisors were entitled to summary judgment in their individual capacities because the plaintiff sought redress against them in these proceedings for their actions while they presided over Chirico's post-termination hearing. The court held that in conducting such hearing, the Supervisors acted in a judicial capacity and were absolutely immune.

The court also held that the individual defendants and the Township manager were entitled to qualified immunity with respect to plaintiff's federal claims because there was no issue concerning the competence of their action or any knowing violation of the law in dealing with Chirico's failure to report for duty and his ultimate termination. The court found no evidence whatsoever to support the allegation of malice.

Appendix A

Accordingly, the judgment in favor of the appellees will be affirmed. Costs taxed against the appellants.

TO THE CLERK:

Please file the foregoing opinion.

s/ Max Rosenn
Circuit Judge

[stamped]
RECEIVED OCT 20 1995

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1001

JAMES J. CHIRICO; DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Appellants

v.

TOWNSHIP OF NEWTOWN; EDWARD M. CORSE, an adult individual; LARRY M. COMUNALE, an adult individual; PAUL E. RUSSELL, an adult individual; STEWART SPAHR, an adult individual; SUZANNE MATHES, an adult individual; EDWIN COE WILLIAMS, an adult individual a/k/a E. COE WILLIAMS; DELAWARE COUNTY ASSOCIATION OF MUNICIPALITIES

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 92-cv-04956
District Judge: Honorable Marvin Katz

Submitted Under Third Circuit LAR 34.1(a) October 11, 1995
Before: GREENBERG, LEWIS, and ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the

Appendix B

United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on October 11, 1995.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court filed December 6, 1994, be and the same is hereby affirmed.

Costs taxed against appellants.

Attest:
s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: OCT 17 1995

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 5, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 92-4956

JAMES CHIRICO and DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Plaintiffs,

v.

TOWNSHIP OF NEWTOWN, et al.,

Defendants.

MEMORANDUM AND ORDER

AND NOW, this 5th day of December, 1994, upon consideration of Plaintiffs' Motion For Partial Summary Judgment and Motion For Summary Judgment Filed By The Defendants, Township Of Newtown, Edward M. Corse, Larry M. Comunale, Paul E. Russell, Stewart Spahr, Suzanne Mathes, Edwin Coe Williams A/K/A E. Coe Williams and the parties' respective responses thereto, it is hereby **ORDERED** that Plaintiffs' Motion is **DENIED** and Defendants' Motion is **GRANTED** in part and **DENIED** in part.

Appendix C

I. Background

On November 10, 1990, plaintiff James Chirico ("Chirico"), then a veteran police officer of defendant Township of Newtown ("Newtown"), responded to a medical emergency call with a fellow officer. In the course of his duties, Chirico performed CPR on an adult male (the "Victim") and was exposed to blood and other bodily fluids of the Victim. Later that day, Chirico was advised that the Victim was HIV positive and might have AIDS. On November 12, 1990, Chirico underwent a blood test to determine whether he had contracted HIV as a result of his encounter with the Victim. On November 12 and 13, 1990, Chirico was assigned days off with pay by Newtown and he returned to work on November 14, 1990. Later in November, Chirico was told that his blood test showed no traces of HIV or AIDS.

On either November 26 or 27, 1990 Chirico called in sick and thereafter did not return to work. Chirico then informed his superiors that he was emotionally unable to report for duty. On November 28, 1990 Chirico consulted with a psychiatrist. Chirico asserts that his inability to work and his need for treatment by a psychiatrist were the result of emotional problems he experienced as a result of his belief that he may have contracted HIV. On November 28, 1990 Chirico received psychiatric treatment at Fitzgerald Mercy Hospital and was advised that he could return to work. On November 30, the Township Manager of Newtown, defendant Larry M. Comunale ("Comunale"), advised Chirico that his absence from work would be charged against his accumulated sick leave. Until February 14, 1991, Newtown permitted Chirico to take sick leave and continue all benefits of employment pursuant to the operative collective bargaining agreement

between plaintiff Delaware County Lodge No. 27, Fraternal Order of Police ("Lodge No. 27") and Newtown.

In January 1991, Chirico began a series of psychiatric treatments under the direction of Louis B. Lipschultz, M.D. By letter of January 18, 1991, the Township Manager informed Chirico that the Victim had also tested negative for HIV and AIDS. That letter also formally reiterated Newtown's demand that Chirico provide a "certificate of disability from an M.D." and requested that he submit to an examination by Dr. Wolfram Rieger, a doctor selected by Newton to assess Chirico's workman's compensation status.[1] The letter also stated:

> You may have a hearing before the Board of Supervisors prior to the stoppage of your pay and benefits if you so request within ten days hereof.

By letter of January 22, 1991, Chirico, through counsel, informed Newtown that he would submit to an examination by Dr. Rieger. The letter also requested a certificate of disability form. In response to this request Newtown informed Chirico that no standard certificate of disability form was used by the township. On February 1, 1991, Dr. Rieger examined Chirico and opined that Chirico could return to work without restrictions or limitations. In response, Chirico then provided Newtown with a short note from Dr. Lipschultz which stated:

> Officer Jim Chirico is currently under my

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1. It appears that Chirico did not pursue a claim for workman's compensation benefits.

medical care. To date, he remains disabled and unfit for duty.

On February 12, 1991, Newtown's Township Manager advised Chirico, by letter, that: (1) he had failed to provide an sufficient certificate of disability; (2) he could not continue on sick leave; and (3) he was to report for duty on February 14, 1991.

On February 19, 1991, the Township Manager advised Chirico that he could be suspended by the Board of Supervisors (the "Board") without pay as of February 14, 1991 because he did not report on that date. On February 21, 1991, the Township Manager advised Chirico, by letter, that his unexcused absence would be reconsidered if Chirico provided Newtown with a report justifying his continued absence from work. The February 21, 1991 letter also informed Chirico that "unless we approve an acceptable report by March 1, 1991, we will consider you a voluntary quit . . . effective February 14, 1991."

Chirico responded to Newtown's request by providing a more detailed report dated February 21, 1991, from Dr. Lipschultz. On April 15, 1991, Newtown informed Chirico, by letter, that Dr. Lipschultz' February 21, 1991 report was unacceptable and that Newtown accepted Chirico's voluntary quit from the police department as of February 14, 1991. The letter also informed Chirico that if he wished to have a post-termination hearing before the Board, he was to inform the Township Manager before April 26, 1991.

Chirico demanded a hearing before the Board. Chirico also filed a mandamus action against Newtown in Delaware

Appendix C

County Common Pleas Court claiming that he was disabled as the result of a duty-related incident and that he was therefore entitled to benefits under the Pennsylvania Heart and Lung Act ("HLA"), 53 P.S. §§ 637-38. The Common Pleas Court remanded Chirico's claim for HLA benefits to the Board for consideration as a component of the pending post-termination hearing.

On January 2, 1992, the Board, after a lengthy hearing, issued an adjudication affirming Chirico's termination as both: (1) a "voluntary quit" and (2) an appropriate disciplinary response for Chirico's dereliction of his duty to report to work as ordered. *See* Def. Mot. Summ. J. Ex. A. The Board's adjudication also denied Chirico's HLA benefits claim. Chirico appealed both determinations to the Court of Common Pleas claiming broadly: (1) that his due process and equal protection rights had been violated by Newton's failure to hold a pre-termination hearing as required by *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); and (2) that the Board's post-termination hearing and adjudication were biased in a variety of ways including *per se* bias as recognized by *Copeland v. Township of Newtown*, 608 A.2d 601, because the Board members who decided to terminate Chirico participated in the post-termination hearing. *See* Def. Resp. Ex.A at 14. The Court of Common Pleas upheld Chirico's termination and denial of benefits. *Chirico v. Township of Newtown*, (No. 91-7954, filed December 2, 1992); *Chirico v. Township of Newtown*, (No. 92-295, filed December 2, 1992). Chirico appealed these decisions to the Commonwealth Court of Pennsylvania.

On August 26, 1992, prior to the decision of the Commonwealth Court, Chirico and Lodge No. 27 initiated the

instant civil rights action against Newtown, the Township Manager, the members of the Board and the Delaware County Association of Municipalities.[2] In the instant action, plaintiffs claim that in terminating Chirico the defendants:[3] (1) violated Chirico's federal rights protected by 42 U.S.C. § 1983 including Chirico's procedural and substantive due process rights (Comp. at 6-23, 25-28) and Chirico's equal protection rights (Comp. at 24-25); and (2) committed various state law offenses, including tortious interference with contract and intentional infliction of emotional distress (Complaint at 28-41). After a pre-trial conference on December 4, 1992, this court determined that the instant action was related to the proceedings in Commonwealth Court and, by Order of December 4, 1992, placed the matter in civil suspense pending the completion of the related state court proceedings.

By Order and unreported decision of November 8, 1993, the Commonwealth Court affirmed both decisions of the Court of Common Pleas. *See* Def. Mot. Summ. J. Ex. C With respect to Chirico's due process claim, the Commonwealth Court held that *Loudermill* does not mandate a pre-termination hearing, but rather the "*opportunity* for [a] hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 543. The Commonwealth Court then found that, by its letter of January 18, 1991, Newtown had offered Chirico an appropriate pre-termination hearing. *See infra* at 3. With respect to Chirico's claims of bias, the Commonwealth Court upheld the

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2. The Delaware County Association of Municipalities was later dismissed by stipulation of the parties.

3. It appears that plaintiffs have sued the individual defendants, the Township Manager and the members of the Board in both their official and individual capacities. *See Gregory v. Chehi*, 843 F.2d 111, 119 (3d Cir. 1988).

determinations below that Chirico's termination was not the result of bias and specifically noted: (1) there was no evidence in the record that the members of the Board who conducted Chirico's post-termination hearing participated in the Newtown's decision to terminate Chirico's employment;[4] and (2) Chirico's counsel did not argue bias in violation of Copeland at the hearing before the Board.

Chirico then sought review of Commonwealth Court's decision by the Supreme Court of Pennsylvania. The related state court proceedings were completed when the Pennsylvania Supreme Court denied Chirico's Petition for Allowance of Appeal by Order of September 27, 1994.

II. Cross-Motions For Summary Judgment

Plaintiffs' motion for partial summary judgment seeks judgment on Count I of the Complaint. The motion centers on Chirico's allegations that the defendants violated his procedural and substantive due process rights when his employment and benefits were terminated on April 15, 1991. Specifically, plaintiffs' motion asserts that: (1) Chirico was deprived of a pre-termination hearing; (2) the defendants failed to follow procedures set forth in the police code; and (3) Chirico's work-related benefits (HLA benefits, sick leave and health insurance coverage) were terminated without due process. Defendants' motion seeks summary judgment on all plaintiffs' federal claims on the grounds of issue preclusion, claim preclusion, absolute immunity and qualified immunity.

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4. The Commonwealth Court specifically found that the letter of April 15, 1991 deeming Chirico's actions a voluntary quit was signed by the Township Manager and in this regard "the record reveals that all correspondence and contact were with him alone."

Appendix C

Defendants also seek summary judgment on plaintiffs' state law claims. Plaintiffs' response to defendants' motion argues:

1. The state court proceedings were flawed because all relevant evidence was not in the record and the state adjudicative bodies improperly weighed certain evidence, (Pl. Resp. at 11-12);

2. While Chirico was offered a pre-termination hearing with regard to employment, he was not offered such a hearing with regard to the attendant benefits of employment — sick leave and health insurance coverage — in violation of *Loudermill*, (*Id.* at 12-14); and

3. The instant claim that Chirico termination was the result of bias or prejudice on the part of Newtown's officials stemming from prior legal action by Chirico was not previously adjudicated and, therefore, is not subject to preclusion, (*Id.* at 14).

III. Discussion

Summary judgment is authorized by Federal Rule of Civil Procedure 56, which states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In response, the non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions. *Fireman's Ins. Co. v. DeFrensne,* 676 F.2d 965, 969 (3d Cir. 1982). "Material" facts are those facts that might affect the outcome of the suit under the substantive law governing the claims made. An issue of fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" in light of the burdens of proof required by substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986).

Defendants are entitled to summary judgment on plaintiffs' federal claims because plaintiffs' federal claims are barred by issue preclusion and claim preclusion. *See Rider v. Pennsylvania,* 850 F.2d 982 (3d Cir. 1988). In addition, plaintiffs' federal claims against the individual defendants, the Township Manager and the Board Members, in their personal capacities fail for the additional and independent reasons that the Board Members are entitled to both absolute and qualified immunity and the Township Manager is entitled to qualified immunity. *See Mireles v. Waco*, 502 U.S. 9 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. Claim Preclusion and Issue Preclusion

Issue preclusion, otherwise known as collateral estoppel,

bars re-litigation of an issue identical to that resolved in a prior action. Claim preclusion, often called res judicata, is broader in effect and prohibits reexamination not only of matters actually decided in the prior case, but also those that the parties might have, but did not, assert in that action.[5] *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993).

When a prior case has been adjudicated in state court, federal courts are required by 28 U.S.C. § 1738 to give full faith and credit to the state judgment and, in section 1983 cases, apply the same preclusion rules as the courts of that state. *Id.* Pennsylvania requires a concurrence of four conditions before claim preclusion can apply. The two actions must share an identity of the (1) thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued. *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988) (*citing Duguesne Slag Products Co. v. Lench*, 415 A.2d 53, 56 (1980)). Under Pennsylvania law, the following conditions must exist before issue preclusion may be invoked: (1) The issue decided in the prior adjudication was identical with the one presented in the later action; (2) There was a final judgment on the merits; (3) The party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) The party against whom it is asserted had a full and fair opportunity to litigate the issues in question in the prior action. *Gregory*, 843 F.2d at 121 (*citing Safeguard Mut. Ins. Co. v. Williams*, 574 A.2d 664, 668 (1975)).

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5. One of the prerequisites to invoking claim preclusion is that the same individuals or their privies are parties to the prior litigation. *Stevenson v. Silverman*, 417 Pa. 187 (1965). Here, it is clear that plaintiff, Delaware County Lodge No. 27, has no independent basis to assert the claims in the instant action and is therefore in privity with plaintiff Chirico.

Appendix C

1. Newtown and the Individual Defendants in Their Official Capacity

Plaintiffs' federal claims against Newtown and the individual defendants in their official capacities are clearly barred by claim preclusion and issue preclusion.[6] *Gregory*, 843 F.2d at 120 (*citing Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690 n.65 (1978)).[7] Plaintiffs' allegations that Chirico's employment was terminated: (1) without due process; (2) in violation of his equal protection rights, and (3) as a result of bias on the part on Newtown's officials were adjudicated in defendant Newtown's favor in state court and are therefore clearly barred by claim preclusion. *Rider*, 850 F.2d at 988. Further, as an essential component of their decisions, the Board and the reviewing state courts unequivocally found that Chirico was provided a sufficient opportunity for a pre-termination hearing as required by *Loudermill*, and, consequently, Chirico's allegations of employment termination without due process are barred by issue preclusion.[8]

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6. Plaintiffs do not dispute that Lodge No. 27 has no independent basis to assert the claims in this action and therefore can be considered in privity with Chirico for purposes of issue preclusion and claim preclusion.

7. In the claim preclusion context, governmental officials sued in their official capacities for action taken in the course of their duties are considered in privity with the governmental body. They may invoke a judgment in favor of the governmental entity as may that body itself. *Gregory*, 843 F.2d at 120 (*citing Mears v. Town of Oxford*, 762 F.2d 368, 371 n.3 (4th Cir. 1984)).

8. In their response brief, plaintiffs argue against this conclusion by contending that newly discovered evidence and the state courts' unprincipled assessment of the evidence warrant re-litigation of Chirico's claims. Such

(Cont'd)

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Plaintiffs' allegation that Chirico's civil right were violated because the defendants did not follow the procedures set forth in the police code is likewise barred by claim preclusion and issue preclusion. Chirico raised this exact contention in the state court proceedings and it was decided against him. The facts, as determined by the Board's adjudication, which was affirmed by the Court of Common Pleas and the Commonwealth Court, are that Chirico quit voluntarily and that he acted in neglect of duty by failing to report to work and therefore the procedures plaintiffs assert were violated were not applicable. Moreover, the claim could have been raised by Chirico and, therefore, is barred. *Rider,* 850 F.2d at 988.

Finally, the claim that plaintiffs' stress in their reply brief — that Chirico was deprived of HLA benefits, accumulated sick leave and health insurance coverage without due process — is also bared by claim preclusion and issue preclusion. First, the Board addressed these claims and held that Chirico was not entitled to: (1) health insurance or other benefits because he was a "voluntary quit;" (2) to HLA benefits and (3) to additional sick days. These holdings were affirmed by the two state appellate courts that reviewed them. Second, to the extent plaintiffs argue that Chirico's due process rights were violated because he did not receive a hearing prior to the termination of these benefits, issue preclusion estops plaintiffs from arguing that Chirico was not given the opportunity for a pre-termination hearing in accordance with

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(Cont'd)
contentions are insufficient to overcome claim preclusion and issue preclusion. *See Rider,* 850 F.2d at 988 (res judicata precludes parties whose action has reach a final judgment on its merits, from re-litigating issues "that were or could have been raised in that action").

Loudermill.[9] Third, even if the exact issue plaintiffs press today was not raised in the state court proceedings, plaintiffs' claim is barred by claim preclusion because it could have been raised in that action. *Rider,* 850 F.2d at 988.

2. The Individual Defendants in Their Personal Capacity

In *Gregory* and *Edmundson*, the Third Circuit reversed district court grants of summary judgment based on claim preclusion in favor of individual defendants in their personal capacities. In so holding, the Third Circuit found that when there is a prior state court action against a municipality the defense of claim preclusion does not inure to municipal employees sued in their personal capacities in a subsequent federal suit because the identity of the parties test is not met. *Edmundson*, 4 F.3d at 191; *Gregory*, 843 F.2d at 120. However, in so holding the Third Circuit recognized the availability of issue preclusion to municipal employees who, after a prior suit against their employer, are sued in their personal capacities in a subsequent federal suit.[10]

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9. The fact that Newtown's January 18, 1991 notice of an opportunity for a pre-termination hearing mentioned employment generally and did not specifically enumerate the attendant benefits of employment that would also be terminated does not raise a material issue of fact that Chirico was deprived of an opportunity for a pre-termination hearing with regard to employment benefits.

10. In both *Edmundson* and *Gregory* the Third Circuit found that issue preclusion did not bar the respective plaintiff's claims. In *Gregory*, the plaintiff's claim that was not barred was explicitly excluded from consideration in the prior proceeding. *Gregory*, 843 F.2d at 113-114, 121. In *Edmundson*, the plaintiff's claim that was not barred was because the prior action that the district court gave preclusive effect was a judicially unreviewed agency decision. In the

(Cont'd)

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Here, plaintiffs' claims against the Township Manager and the members of the Board in their individual capacities are barred by issue preclusion. The identical issue pressed in this action of whether Chirico was granted sufficient and unbiased due process as required by *Loudermill* and *Copeland* was fully and fairly adjudicated against the plaintiffs in the prior state court proceeding and, therefore, is barred from being re-litigated by issue preclusion. *Williams*, 574 A.2d at 668; *supra* at 11-13.

In addition, the narrow issue that plaintiffs' focus on in their response as being "new" — the claim that the events surrounding Chirico's termination were the result of bias or prejudice on the part of Newtown's officials — is clearly barred. Plaintiffs' present claims of bias by the individual defendants in their personal capacities are barred by issue preclusion because: (1) the issue of bias was decided against Chirico in the state court proceedings, and (2) in those proceedings, Chirico was provided a full and fair opportunity to litigate that issue. *Williams*, 574 A.2d at 668. Moreover, this narrow issue of bias the plaintiffs now stress is inextricably tied to the other matters presented in the state court, which were fully and fairly adjudicated against Chirico, and therefore is barred by issue preclusion. *Gregory*, 843 F.2d at 121.

B. Absolute Immunity

The defendant members of the Board are also entitled to

(Cont'd)
present action, none of the plaintiffs' claims were excluded from consideration in the prior proceedings and the prior proceedings were subject to thorough judicial review.

summary judgment in their individual capacity on the ground that they are immune from suit for their actions in a judicial capacity during Chirico's post-termination hearing. *See Brown v. Griesenaur*, 970 F.2d 431 (8th Cir. 1992). Plaintiffs' claims against the Board members center on the members' actions during Chirico's post termination hearing. During the hearing process the Board members' actions were essentially judicial or adjudicatory, as opposed to legislative or ministerial, and such actions are absolutely immune from suit under 42 U.S.C. § 1983. *Id.* at 437.[11] Because the instant action against the Board members seeks redress for their actions while they presided over Chirico's post-termination hearing, the defendant Board members are entitled to absolute immunity and a corresponding grant of summary judgment.

C. Qualified Immunity

The individual defendants, the Township Manager and the Board members, are entitled to qualified immunity and a corresponding grant of summary judgment with respect to plaintiffs' federal claims. Plaintiffs argue that qualified immunity is not applicable because *Loudermill* clearly establishes Chirico's right to a pre-termination hearing and qualified immunity is not applicable when defendant municipal officials act with malice. Pl. Resp. at 19-21.

Qualified immunity insulates state actors from personal liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v.*

11. Immunity analysis focuses on the nature of the function performed, not the identity of the actor who performed it. *Forester v. White*, 484 U.S. 219, 229 (1988).

Fitzgerald, 457 U.S. 800, 818 (1982). Thus, the ultimate issue is whether "reasonable officials in the defendants position at the relevant time could have believed, in light of the decided case law, that their conduct would be lawful." *Good v. Dauphin County Social Servs. for Children and Youth*, 891 F.2d 1097, 1092 (3d Cir. 1989). With regard to the application of qualified immunity in the local government context, the Third Circuit has recently stated:

> When considering whether members of local legislative bodies are entitled to immunity from suit, we have recognized that there is a compelling need for such a protective doctrine because of the severe chilling effect numerous suits for damages would have on prospective officials. We also believe that adherence to the immunity doctrine is necessary in order to allow elected or appointed officials to make intelligent . . . decisions without constant fear of litigation infecting the decision-making process.

Acierno v. Cloutier, Nos. 93-7456 & 7617, slip op. at 33 (3d Cir. Oct. 18, 1994) (en banc (citations omitted).[12]

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12. The Third Circuit summarized the doctrine of qualified immunity as follows:

> Thus, the doctrine of qualified immunity protects the action of municipal officials except when they act in a "plainly incompetent" manner or when the "knowingly violate the law."

Id. (citations omitted).

Here, there is simply no material issue of fact that the defendants acted incompetently or in knowing violation of the law in dealing with Chirico's failure to report for duty and his ultimate termination. Plaintiff's contentions regarding the defendants' alleged *Loudermill* violations were put to rest by the state court proceedings. In addition, the record clearly demonstrates that the individual defendants did offer Chirico pre-and post-termination due process and, therefore, putting aside the prior proceedings, there is no issue of material fact with regard to whether the individual defendants violated Chirico's clearly established due process rights.

Finally, plaintiffs' argument that the individual defendants acted with malice and are therefore not entitled to qualified immunity fails. First, plaintiffs cite no evidence in the record to support this contention. Instead, they simply reiterate the contentions in the Complaint. This is insufficient to preclude summary judgment. *See Fireman's Ins. Co. v. DeFrensne,* 676 F.2d 965, 969 (3d Cir. 1982). Second, an independent review of the record uncovers no evidence of deliberate conduct in violation of Chirico's clearly established constitutional rights. The individual defendants are entitled to qualified immunity with regard to Chirico's federal claims.

D. State Claims

There are no viable federal claims in the instant action. On balance, considerations of judicial economy, convenience and fairness to the litigants do not support the exercise of supplemental jurisdiction over plaintiffs' state law claims. *Growth Horizons, Inc. v. Delaware County,* 983 F.2d 1277, 1284 (3d Cir. 1993); 28 U.S.C. § 1367. No trial on the plaintiffs' federal claims is necessary. The state law claims

may raise complex state law issues. Accordingly, the plaintiffs' state law claims will be dismissed without prejudice. 28 U.S.C. §§ 1367(c)(1), (3).

BY THE COURT:

s/ Marvin Katz
MARVIN KATZ, J.

ENTERED: 12-6-94
CLERK OF COURT

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 5, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 92-4956

JAMES CHIRICO and DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Plaintiffs,

v.

TOWNSHIP OF NEWTOWN, et al.,

Defendants.

JUDGMENT

AND NOW, this 5th day of December, 1994 it is hereby **ORDERED** that **JUDGMENT** is entered in favor of defendants and against plaintiffs on plaintiffs' federal claims. Plaintiffs' state law claims are **DISMISSED** without prejudice.

BY THE COURT:
s/ Marvin Katz
MARVIN KATZ, J.

ENTERED: 12-6-94
CLERK OF COURT

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

(2)

No. 95-1152

In The

Supreme Court of the United States

October Term, 1995

JAMES J. CHIRICO and DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Petitioners,

v.

TOWNSHIP OF NEWTOWN, EDWARD M. CORSE, an adult individual, LARRY M. COMUNALE, an adult individual, PAUL E. RUSSELL, an adult individual, STEWART SPAHR, an adult individual, SUZANNE MATHES, an adult individual, EDWIN COE WILLIAMS, a/k/a E. COE WILLIAMS, an adult individual and DELAWARE COUNTY ASSOCIATION OF MUNICIPALITIES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the federal courts were correct in dismissing the civil rights complaint of James J. Chirico, a former police officer with the Township of Newtown, on the basis of issue and claim preclusion when Chirico had unsuccessfully challenged his termination in the state courts of Pennsylvania.

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COUNTERSTATEMENT OF THE CASE

A. STATEMENT OF FACTS

On November 10, 1990, plaintiff, James J. Chirico, then a police officer with Newtown Township, Pennsylvania, responded to a medical emergency call with a fellow officer. While administrating emergency CPR to a male individual, Chirico was exposed to bodily fluids from the victim. Later that day, information was given to Chirico that the victim may have been HIV positive or had the AIDS virus. Two days later on November 12, 1990, Chirico and the victim underwent blood tests to determine if Chirico may have contracted the AIDS virus as a result of his exposure to the victim's bodily fluids. (130a-132a; 141a-143a; 149a).[1]

The blood test results from both Chirico and the victim indicated that Chirico was *not* infected with the HIV or AIDS virus. These test results were communicated to Officer Chirico. (150a).

Following the incident, Chirico was assigned two days off with pay by the Chief of Police and he then returned to work until November 26, 1990. Despite the reassurance from the negative test results, Chirico claimed that he was unable to report for duty because of his emotional condition. However, Chirico continued to work as a security guard at a local country club. (132a-133a). The following day Chirico sought emergency psychiatric treatment at a local hospital. However, the

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[1] Reference such as "149a" is made to the Appendix filed in the Third Circuit, whereas reference to the Appendix submitted herewith will be cited as "App. 1."

said doctor advised Chirico that he could return to work. (132a).

In January of 1991, Chirico sought other psychiatric treatment and, after initial evaluation, began treatment with Lewis B. Lipschultz, M.D. (134a; 150a-151a).

Aware that Chirico was receiving sick days for his missed time from work, the Township manager, respondent, Larry Comunale, issued Chirico a letter, a copy of which was provided to this attorney, dated January 18, 1991, directing him to provide a "certificate of disability from an M.D." and to submit to an independent medical examination by Dr. Rieger. *The said letter of January 18, 1991, further advised and offered Chirico a right to a hearing prior to any stoppage of pay or benefits.* (See, 150a; 158a; 159a-161a).[2]

Chirico failed to request such a hearing.

Chirico's attorney issued a letter, dated January 22, 1991, stating that Chirico would appear for the scheduled examination with Dr. Rieger and requested a copy of the form of disability certificate used by the Township. (150a-151a). The Township Manager confirmed that there was no specific form of certificate of disability utilized by the Township. However, the Township needed to know from a qualified physician that an illness existed and a

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[2] This fact has been glaringly omitted from petitioners' Statement of Facts, not only in his Petition for Writ to this Court, but to all of the courts below. To date, petitioner continues to argue due process violations despite the undeniable conclusion that he was offered a pre-termination hearing.

physician needed to provide relevant and specific information in order for the Township to best evaluate the claim. (162a; 151a). Despite this request, Chirico provided the Township with a note written by his psychiatrist which stated:

> Officer Jim Chirico is currently under my medical care. To date, he remains disabled and unfit for duty.

(151a; 225a).

Faced with such an unspecific note, on February 12, 1991, the Township Manager wrote to Chirico advising him of his failure to provide a certificate of disability and provided Chirico with a copy of the Township's psychiatric report. The letter further stated that if plaintiff failed to report for duty on February 14, 1991, he would be subject to disciplinary action. (151a; 163a).

On February 19, 1991, the Township Manager again issued correspondence to Chirico advising that he was going to recommend that Chirico be suspended without pay as of February 14, 1991, in that a three-line note on a prescription form by Dr. Lipschultz was not proper to evaluate either the illness or disability. (164a).

On February 21, 1991, the Township Manager advised petitioner that the Township was willing to reconsider his unexcused absence provided that Chirico provide the Township with an acceptable report justifying Chirico's absence from work and that "unless we receive an acceptable report by March 1, 1991, we will consider you a voluntary quit. . . . effective February 14, 1991." (165a; 135a; 151a-152a).

Chirico responded by providing a three-page report dated, February 21, 1991, from Dr. Lipschultz. (152a). On April 15, 1991, the Township Manager again wrote to Chirico advising that the report from Dr. Lipschultz, dated February 21, 1991, was unacceptable. The Township Manager enclosed a copy of Dr. Rieger's correspondence of March 12, 1991, in which Dr. Rieger again reiterated his opinion that plaintiff was fit for duty. The letter went on to state that the Township accepted plaintiff's voluntary quit from the police department as of February 14, 1991. If plaintiff wished to have a hearing before the Board of Supervisors, he was to tell the Township Manager on or before April 26, 1991. (166a; 169a).

Chirico demanded such a hearing and extensive hearings were held on various dates through the summer and fall of 1991. During the hearing, Chirico claimed that his disability arose from a duty-related incident and filed an action in mandamus in the Court of Common Pleas, Delaware County, Pennsylvania, seeking to compel the Township to provide benefits under the Heart and Lung Act ("HLA") of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§637-38. The Court of Common Pleas remanded Chirico's claim for HLA benefits to the Township Board of Supervisors for determination as part of the local agency proceedings regarding Chirico's termination of employment claim. (130a-131a; 152a).

By Order dated January 3, 1992, the Board of Supervisors issued extensive findings of fact and conclusions of law, finding Chirico's termination first, as a "voluntary quit" and, second, as a "neglect of duty under the Police Tenure Act." (130a-139a). The Board further denied Chirico's claim for HLA benefits in that Chirico was not

suffering from an illness that prevented him from working. (138a).

B. THE STATE COURT PROCEEDINGS

Unsatisfied with the results before the Board of Supervisors, Chirico appealed the adjudications to the Court of Common Pleas, which affirmed the denial of HLA benefits and upheld his termination. *Chirico v. Township of Newtown*, CCP, No. 91-7954 and No. 92-295.

Still unsatisfied, petitioner appealed to the Commonwealth Court of Pennsylvania, which affirmed the lower court's rulings by Order dated February 8, 1993. *Chirico v. Township of Newtown*, Commonwealth Court, Nos. 2675 C.D. 1992 and 2676 C.D. 1992, (A copy of this is submitted at App. 33-40). As Chirico had done in the Court of Common Pleas, he again claimed in the Commonwealth Court that the Supervisors' decision was tainted with bias, and that his due process and equal protection rights were violated by failing to have a pre-termination hearing constitutionally mandated by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In rejecting Chirico's arguments that his due process and other rights were violated, the Pennsylvania Commonwealth Court ruled that Chirico was indeed *offered* a pre-termination hearing in the correspondence from the Township Manager to Chirico dated January 18, 1991, which stated, in pertinent part:

> You may have a hearing before the Board of Supervisors *prior to stoppage of your pay and benefits if you so request within ten days hereof.*

As stated by the Commonwealth Court, "*Loudermill* requires no more than an opportunity for a hearing appropriate to the nature of the case." (App. 38). The Commonwealth Court also rejected Chirico's other arguments and found no bias on the part of the Board of Supervisors and no violation of the Heart and Lung Act. (App. 38-39).

Chirico's state court action came to an end when the Supreme Court of Pennsylvania denied Chirico's Petition for Allowance of Appeal by Order dated September 27, 1994. *Chirico v. Township of Newtown*, Supreme Court of Pennsylvania, No. 890 E.D. Allocatur Docket 1993. (168a).

C. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW

On August 26, 1992, prior to the decision of the Commonwealth Court, Chirico filed the instant civil rights action under 42 U.S.C. §1983, against the Township of Newtown and the individual members of the Board of Supervisors. The complaint included state law claims for tortious interference with contractual relations, breach of contract, and intentional and negligent infliction of emotional distress. (10a-50a). In setting forth the factual basis for these claims, the federal complaint raised the same facts and arguments advanced by Chirico in the Court of Common Pleas, Commonwealth Court and, ultimately, the Pennsylvania Supreme Court.

In denying Chirico's motion for partial summary judgment, and granting the respondents' summary judgment, the District Court found that Chirico's claims under the federal Civil Rights Act, 42 U.S.C. §1983, were

barred under the doctrines of issue and claim preclusion. As to the individual defendants in their personal capacities, the District Court found that the Supervisors, since they were acting in a judicial capacity, were entitled to absolute immunity. The Supervisors along with the Township Manager, Larry Comunale, were also entitled to qualified immunity. In so ruling, the District Court recognized that Chirico's allegations of bias by the individual defendants were previously raised, or could have been raised, in the state court proceedings.[3]

Chirico appealed from this adverse District Court decision to the Third Circuit Court of Appeals. The Third Circuit rejected all of Chirico's claims on the basis of issue and claim preclusion, and did not reach the immunity issues raised below.

REASONS FOR DENYING THE WRIT

I. The Third Circuit Was Correct In Applying Principles Of Issue And Claim Preclusion To Bar Chirico's Civil Rights Claim When Chirico Had Unsuccessfully Challenged His Dismissal In The State Court Proceedings

The District Court for the Eastern District of Pennsylvania, as well as the Third Circuit Court of Appeals, correctly held that petitioners' claim for deprivation of

[3] The remaining defendant, Delaware County Association of Municipalities, was dismissed, via stipulation of counsel, prior to the filing of the summary judgment motions.

civil rights under 42 U.S.C. §1983 was barred under the doctrines of issue and claim preclusion.

Res judicata and collateral estoppel are related doctrines which preclude relitigation of claims and issues that have previously been disposed of in an earlier action. Res judicata, now known as claim preclusion, prohibits parties, or their privities, whose action has reached a final judgment on the merits, from relitigating issues "that were or could have been raised in that action." *Rider v. Commonwealth of PA*, 850 F.2d 982, 988 (3d Cir. 1988), *citing, Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 111, 66 L.Ed.2d 308 (1980). Collateral estoppel, now known as issue preclusion, provides that once a court has decided an issue of fact or law necessary to its judgment, that decision will preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case or his privity. *Rider*, 850 F.2d at 989.

In this case, the previous judgment which the federal courts found to be preclusive is a state court judgment. Federal courts must give full faith and credit to the state court judgment under 28 U.S.C. §1738. Indeed, this Court has held that §1738 requires that state court judgments be given both issue and claim preclusive effect in subsequent actions under 42 U.S.C. §1983. *Allen v. McCurry, supra* (issue preclusion); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) (claim preclusion).

In fact, the doctrines of issue and claim preclusion have long been favored by this Court for the following reasons:

> Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.

Astoria Federal Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 108, 111 S.Ct. 2166, 2169, 115 L.Ed.2d 96 (1991), *citing, Parklane Hosiery Co. v. Shore*, 438 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979).

Under Pennsylvania law, claim preclusion requires the following four conditions. The two actions must share: (1) an identity of the thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued. *See, Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988). Although all of these four criteria are necessary, the state courts have avoided mere technical adherence to mechanical principles in interpreting the same. *Id.*

Moreover, claim preclusion prohibits a party from prevailing on issues he might have but did not raise in the first action. *Id.*

On the other hand, issue preclusion requires the following: (1) the issue decided in the first action must be identical; (2) a final judgment on the merits; (3) the party

against whom the plea is asserted was a party, or in privity with a party to the prior action; and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in the prior action. *Gregory v. Chehi*, 843 F.2d at 121, *citing, Safeguard Mut. Ins. Co. v. Williams*, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975).

In the instant case, the Third Circuit was correct in holding that the state court proceedings went to a final judgment on the merits and that Chirico had an opportunity to fully litigate the issues in the state court proceedings. The Third Circuit was also correct in determining that the issues in the state court proceedings were the same as the ones addressed in Chirico's federal civil rights action.[4]

Chirico, in his Petition for Writ of Certiorari, continues to claim that he was denied a pre-termination hearing under *Cleveland Board of Education v. Loudermill, supra*. However, in so arguing, Chirico continues to ignore the Commonwealth Court decision which expressly found that the Township Manager's (Larry Comunale) letter to Chirico of January 18, 1991 offered him the opportunity for a hearing, "prior to stoppage of your pay and benefits if you so request." The Commonwealth Court also found that there was no evidence in the

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[4] Petitioner, Delaware County Lodge Number 27, has no independent basis to assert any federal civil rights violation and is a party only by virtue that it is the union representative of Chirico. Therefore, the District Court, as well as the Third Circuit, correctly ruled that Delaware County Lodge, No. 27, F.O.P., was in privity with Chirico, a fact that has never been contested below, or herein.

record that the Board members, who conducted the hearing, had participated in the termination decision by the Township Manager. The Commonwealth Court further concluded, that there had been no evidence of any constitutional violation.

In an effort to escape the undeniable conclusion that Chirico had unsuccessfully raised these arguments in the state court proceedings, he claims in his Petition for Writ of Certiorari that he was not able to fully and fairly litigate the issue of alleged bias on behalf of the supervisors in the state court proceedings. Again, Chirico misinterprets the law since claim preclusion, "gives dispositive effect to a prior judgment if the particular issue, albeit not litigated in the prior action, could have been raised." *Swineford v. Schneider County of Pennsylvania*, 15 F.3d 1258 (3d Cir. 1994).

Chirico points to the deposition transcripts and claims that he could not present these in the state court proceedings. Again, Chirico ignores the decision of the Third Circuit which correctly rejected this argument as follows:

> If there has been newly-discovered evidence, which could not have been found earlier through due diligence of the parties, this situation may, at the judge's discretion, be grounds for relief from judgment, under Fed.R.Civ.P. 60(b). The record does not reflect that such relief was ever attempted in the state court. Chirico may not use his failure to transverse available procedural avenues as a reason to open new

> channels in the federal courts for another trial on essentially the same issues.

Chirico v. Township of Newtown (App. 7).

Moreover, Chirico, in continuing to claim that he could not submit additional evidence in the state court proceedings, misinterprets Pennsylvania law and ignores direct case law on the subject.

Under the Police Tenure Act, an appeal is provided for in 53 P.S. § 815 as follows:

> *Section 815. Appeal.*
>
> The suspended or dismissed employee shall have the right to appeal to the Court of Common Pleas of the county in which he was employed.

53 P.S. § 815.

In interpreting this section, the Pennsylvania courts are clear that a trial court may, in fact, take additional evidence and make a de novo review of the case, thus affording a plaintiff a full and fair opportunity to establish his case. *Albrechta v. Borough of Shickshinny*, 129 Pa. Cmwlth. 206, 565 A.2d 198, 201 (1989), *appeal denied*, 525 Pa. 620, 577 A.2d 891 (1990). *See also, Skrzysowski v. Attardo*, 63 Pa. Cmwlth. 636, 438 A.2d 1031, fn.3 (1982), *Wilson v. Warminster Township*, 74 D&C 2d 407, 28 Bucks 162 (1976) (On appeal from disciplinary action taken by a municipality against a police officer, the court may take additional testimony and find for itself the facts necessary to a just determination of the controversy.). Where a police officer fails to request a de novo hearing on his dismissal, he waives his right to object on appeal.

Kazmarek v. New Bethlehem Borough Council, 84 Pa. Cmwlth. 19, 478 A.2d 514 (1984).

In the case at bar, after Chirico appealed the decision of the Township Board of Supervisors to the Court of Common Pleas, Chirico could have, *but failed to*, request a trial de novo and seek to admit additional testimony. He had every opportunity to take such testimony but failed to do so.

Thus, Chirico's arguments that he was not permitted under the Police Tenure Act or the Local Agency Law to submit additional testimony is clearly erroneous. Chirico's failure to take the testimony and/or present the deposition testimony of the Township Board of Supervisors rests completely on his shoulders and cannot now be made as a basis for having a second bite of the apple in the federal court system.[5]

As such, Chirico had a full and fair opportunity to present his challenges to his termination in the state court proceedings. He did, in fact, present such challenges and, therefore, his federal civil rights claim is barred under the doctrines of issue and claim preclusion.

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[5] More importantly, Chirico's argument that the deposition testimony of certain members of the Board of Supervisors supports his argument of bias is without merit. The deposition testimony does not establish that the Board members participated in the decision to terminate Chirico. The cited deposition testimony provided by Chirico in his brief only indicates that the supervisor was aware that Chirico was missing time from work. The District Court also made an independent review of the record and found no malice or constitutional violations. (App. 32).

II. There Was No Constitutional Violation Under *Loudermill* or Pennsylvania Law As Every Court To Hear This Claim Correctly Rejected Chirico's Argument That He Was Deprived Of Due Process When Chirico Was Indeed Offered A Pre-termination Hearing

As a preliminary matter, Chirico cannot now argue in this federal case that he was deprived of due process under *Loudermill, supra,* or Pennsylvania law, as this issue was raised and decided adversely to Chirico throughout the state court proceeding. Indeed, although Chirico argues that he was deprived of due process for the failure to have a pre-termination hearing, he neglects to inform this court, as he neglected to do so below, that he was offered a pre-termination hearing in the correspondence from the Township Manager of January 18, 1991, in which Chirico and his attorney were advised that Chirico could ask for a hearing before the Board of Supervisors *prior* to the stoppage of any pay or benefits. (App. 38.) As this Court stated in *Loudermill,* only a very basic opportunity to respond is required to be afforded to an employee in order to fulfill due process. *Loudermill,* 470 U.S. at 546.

In order to escape the undeniable conclusion that Chirico was indeed offered a pre-termination hearing, *which he waived* by not requesting the same once he was offered one, Chirico argues now on appeal that he was entitled to a "full blown" hearing to challenge his termination *prior* to dismissal.

As a preliminary matter, Chirico's argument that he was entitled to a "full blown" hearing prior to the stoppage of any pay was not raised below in the Third Circuit or Eastern District. This Court has stated that ordinarily it

will not "decide a question not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976). *Accord, Delta Airlines, Inc. v. August*, 450 U.S. 346, 362, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1991) (Question presented in petition not raised in court of appeals "is not properly before us"). Moreover, the Court has stated: "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927). As such, since petitioner did not argue in the Third Circuit that he was entitled to a "full blown" hearing under *Loudermill* and Pennsylvania state law, he cannot do so now in front of this Court.

Even if petitioner's argument could be raised before this Court, it is completely without merit. Chirico argues that he is entitled to a "full blown" hearing prior to the stoppage of any pay under the Police Tenure Act and he cites to § 814 which states:

> *Section 814. Hearing on Dismissals.*
>
> *If the person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority.* Such person may make written answers to any charges filed against him. The appointing authority shall grant him a public hearing which shall be held within a period of ten days from the filing of the charges in writing, and written answers thereto filed within five days, and may be continued by the appointing authority for cause at the request of the accused.

. . . .

53 P.S. § 814 (emphasis added).

Accordingly, the *post*-termination hearing provisions of § 814 *only* apply if a police officer *demands* such a hearing.

In furtherance of his argument, Chirico cites to the case of *Pavonarius v. City of Allentown*, 157 Pa. Cmwlth. 116, 629 A.2d 204 (1993), for the proposition that he was entitled to a "full blown" hearing prior to the stoppage of any pay, in other words, a full blown "pre-termination" hearing. *Pavonarius* does *not* require such a hearing. Again, Chirico misstates the law. Rather, the full blown hearing discussed in *Pavonarius* applies to post-termination, not pre-termination.

In *Pavonarius*, the officer, employed with a city of the Third Class,[6] was terminated for medical reasons, and was *not* afforded either a pre-termination hearing or a post-termination hearing. As such, the case is inapplicable, since Chirico was offered both types of hearings by Newtown Township. Chirico waived his right to a pre-termination hearing, and requested, and was given, a post-termination hearing.

Chirico also claims that the Township supervisors were obliged to conduct a hearing in the *absence* of any

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[6] Pavonarius' employment with a city of the Third Class was quite important to the court's decision as it based its decision on provisions of the Third Class City Code, 53 P.S. § 39408. In this matter, Chirico was employed by a township of the Second Class, and, therefore, the cited provisions in *Pavonarius* are distinguishable.

indication by Chirico that he did *not* wish to avail himself of that right. Chirico seems to be arguing that even though he waived his right to a pre-termination hearing, that the Township Board of Supervisors should have nonetheless conducted one. Such an argument is simply illogical. How can one conduct a hearing when the person who is the subject matter of the hearing does not request one?

There have been five separate courts which have listened to Chirico's arguments and wholeheartedly rejected them. Chirico was not deprived of any constitutional rights. He clearly waived his right to a pre-termination hearing, and his attempt to now have his case heard once again must be rejected. The doctrines of issue and claim preclusion were meant to relieve a party of the cost and vexation of multiple lawsuits, to conserve judicial resources and to encourage reliance on adjudications. *See generally, Allen v. McCurry,* 449 U.S. at 94. The policies underlying res judicata are considered so strong that preclusive effect is given to judgments even though they "may have been wrong or rested on a legal principle subsequently overturned in another case." *Federated Dept. Stores v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed. 2d 103 (1981).

Thus, Chirico's claims, which have been heard and rejected by three separate state courts, including the Pennsylvania Supreme Court which denied certiorari, as well as two federal courts, must come to an end. Simply put, the respondents are entitled to the preclusive effect of the favorable decision that they received in the state court case.

III. There Is No Important Issue To Be Decided By This Court

In an effort to convince this Court to hear his claim, a claim that has already been heard and adversely decided to Chirico by no less than five separate courts, Chirico claims that his case is important since it involves issues of fundamental due process enunciated by *Loudermill* and expanded under Pennsylvania law. As previously indicated, this argument was rejected in the state court case. Moreover, *Pavonarius* is distinguishable from this case, and it does *not* stand for the proposition that a police officer is entitled to a "full blown" pre-termination hearing. Even if it did, Chirico cannot now be heard to complain because he raised the issue of due process violations in the state courts, all of which rejected his argument and found no due process violations. Chirico failed to take the state court case further and, thus, the respondents are entitled to its preclusive effect.

More importantly, Chirico neglects and completely ignores the fact that he was offered a pre-termination hearing prior to the stoppage of any pay or benefits. He failed to request such a hearing when it was offered, and he voluntarily waived his right to the same. Having waived that constitutional right to a pre-termination hearing, it is ludicrous to suggest that Chirico can now argue that he should have been given a "full blown" pre-termination hearing anyway.

As to his arguments of a "impartial" tribunal, this argument also was heard and decided adversely against Chirico in the state court proceedings. Chirico continues

to make the unsupported and conclusory allegation that the Township Board of Supervisors participated in the decision of the Township Manager to discipline Chirico. Again, the issue of bias was raised and decided adversely against Chirico in the state court proceedings. Had Chirico desired to present additional evidence in the state court proceedings at the Court of Common Pleas, he could have done so. He chose not to. Chirico's failure to avail himself of the right to present additional testimony in the state court proceeding *does not* make this case one of importance to be heard by this Court.

CONCLUSION

For the foregoing reasons, the respondents, The Township of Newtown, Edward M. Corse, Larry M. Comunale, Paul E. Russell, Stewart Spahr, Suzanne Mathes, and Edwin Coe Williams respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 16, 1996

APPENDIX A – MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 17, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1001

JAMES J. CHIRICO; DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Appellants

v.

TOWNSHIP OF NEWTOWN; EDWARD M. CORSE, an adult individual; LARRY M. COMUNALE, an adult individual; PAUL E. RUSSELL, an adult individual; STEWART SPAHR, an adult individual; SUZANNE MATHES, an adult individual; EDWIN COE WILIAMS, an adult individual a/k/a E. COE WILLIAMS; DELAWARE COUNTY ASSOCIATION OF MUNICIPALITIES

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 92-cv-04956
District Judge: Honorable Marvin Katz

Submitted Under Third Circuit LAR 34.1(a)
October 11, 1995

Before: GREENSBERG, LEWIS, and ROSENN,
Circuit Judges

MEMORANDUM OPINION

ROSENN, *Circuit Judge.*

Appellant James J. Chirico, a former police officer for the Township of Newtown, appeals from a summary

judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the defendants Township of Newton, Edward M. Corse, Larry M. Comunale, Paul E. Russell, Stewart Spahr, Suzanne Mathes and Edwin Coe Williams. Chirico's complaint alleged that the defendants violated his civil rights, 42 U.S.C. § 1983 and § 1985, by failing to provide him with a hearing before the termination of his employment and benefits. Chirico also asserted pendent state law claims for breach of contract and infliction of emotional distress. The district court had jurisdiction under 28 U.S.C. § 1331. The district court held that Chirico's claims were barred by the doctrines of claim and issue preclusion and absolute and qualified immunity. The plaintiff timely appealed. We affirm.

I.

While on duty in 1991 as a police officer, Chirico and his partner responded to an emergency call on behalf of an unconscious man. Chirico administered cardiopulmonary resuscitation (CPR) to him. As the victim regained consciousness, he suffered a nosebleed and his saliva and blood made contact with Chirico. Later, Chirico was informed that the victim had AIDS or was HIV-positive. Chirico went to a hospital for blood testing; he received a negative report. After two days off with pay, Chirico returned to work and was informed that the victim's blood also tested negative for HIV.

Despite these reassurances, Chirico claimed that he continued to worry about contracting a disease and was too disabled to return to work as a police officer. On

November 26, 1990, he reported that he was unable to work because of his emotional condition, although he continued to work as a security guard at Aronimink Golf Club. He saw a psychiatrist two days later. On November 30, 1990, the town manager, Comunale, informed him that his absences would be charged against his accumulated sick leave, which would last through February 14, 1991. After almost two months of absence, the Township, through its manager Comunale, requested a doctor's report showing proof of disability. Comunale further notified Chirico that if he could not prove disability, his employment and benefits would terminate, and that he could request a hearing before their termination. Chirico made no such request. The Township also requested that Chirico submit to a medical examination by an independent doctor. This doctor reported that Chirico was fit for work. Comunale then directed Chirico to return to work by February 14. In response, Chirico submitted a conflicting, cursory statement from his psychiatrist, diagnosing Chirico as too disabled to work. When Comunale informed him that this note was not adequate to evaluate the disability, and that he would be deemed a voluntary quit retroactive to February 14, 1991, Chirico submitted a three-page report from his psychiatrist dated February 21, 1991. On April 15, after reviewing both reports and finding the independent doctor's to be more credible, the town manager retroactively deemed Chirico a "voluntary quit" and terminated his benefits after more than twenty-five years of service.

Chirico then requested a post-termination hearing. During the course of the Township's hearings, Chirico filed a separate action in the Court of Common Pleas for

Delaware County, seeking to compel payment of his Heart and Lung benefits. The court remanded this claim to the Township Board of Supervisors, to be considered as part of the pending termination claims. The Board held that Chirico was not disabled, was not entitled to Heart and Lung benefits, and had properly been treated as a "voluntary quit."

Chirico then appealed his termination of employment and denial of benefits to the County Court of Common Pleas. This court upheld the Township's termination and rejected Chirico's claims of bias on the part of the Supervisors. The Commonwealth Court affirmed the ruling The court found that the Township did not deny Chirico due process; that he had been offered an opportunity for a pre-termination hearing, but he did not request one. Finally, the Supreme Court of Pennsylvania denied his application for appeal.

With his cases pending in the Commonwealth Court, Chirico filed this action in the United States District Court against the Township, its town manager, and the individual members of the Board of Supervisors. He based this suit on a purported violation of his civil rights, claiming that he had been denied his medical benefits without having been provided procedural due process. The defendants moved for summary judgment, which the trial court granted. It held that the issues raised by Chirico in this suit had either already been litigated or could have been litigated in the state court proceedings. Therefore, the district court held that Chirico's claims were barred by claim and issue preclusion. In addition, the court held that the individual Supervisors and the town

manager were entitled to immunity for their actions. Chirico appealed.

II.

This court exercises plenary review over a grant of summary judgment. *Oritani Sav. and Loan Ass'n v. Fidelity and Deposit Co.*, 989 F.2d 635, 637 (3d Cir. 1993). Summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-32 (1986); Fed.R.Civ.P. 56(c). We agree with the district court that Chirico had an opportunity to fully and fairly litigate his complaint in the state court. As all issues presented in this action were either raised at the state court level, or should have been raised there, this action is precluded.

There are two separate but related concepts of preclusion, which prevent a suit already brought and decided in one court from being litigated again in a new forum. Formerly designated as res judicata and collateral estoppel doctrines, they have since been re-named claim preclusion and issue preclusion, respectively, by the Supreme Court and the Restatement on Judgments. See, generally, Restatement (Second) of Judgments, § 27 and accompanying comments. In this case, the previous judgment which defendants argue is preclusive is a state court judgment. In determining the preclusive effect of such a judgment, we apply that state's laws of claim and issue preclusion. Federal courts must give full faith and credit to the state court judgment under 28 U.S.C. § 1738. Full

faith and credit also applied to decisions of state administrative agencies that have been reviewed by state courts. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). These standards are equally applicable in Section 1983 actions. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993) (applying Pennsylvania preclusion law to bar a § 1983 case brought following state unemployment compensation decision). Pennsylvania law bars further federal action on Chirico's part[1].

A. Issue Preclusion

Issue preclusion (formerly collateral estoppel) pragmatically bars re-litigation of an issue actually decided in a previous suit. Under Pennsylvania law, issue preclusion requires the following four conditions: (1) identity of the issue in the current and prior action; (2) a final judgment on the merits of the previous action; (3) identity or privity of the current party against whom the issue is asserted with a party to the prior adjudication; and (4) that the party against whom the issue is asserted had a full and fair opportunity to litigate it in the prior action. *See, Gregory v. Chehi*, 843 F.2d 111, 121 (3d Cir. 1988), *citing Safeguard Mutual Ins. Co. v. Williams*, 345 A.2d 664, 668 (Pa. 1975). In this dispute, the state court proceedings went to a final judgment on the merits, Chirico sued in both actions, and fully litigated the issue in the state action. Thus, requirements two, three and four have been

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[1] The district court noted that Plaintiff Lodge No. 27 has no independent basis to assert any claim, and is considered in privity with Chirico for purposes of preclusion. This decision has not been appealed to this Court.

fully met[2]. There remains for our determination whether the issues conclusively determined by the Pennsylvania courts are implicated again by this action.

In the County Common Pleas court, Chirico challenged his denial of Heart and Lung benefits as not supported by the record. He also claimed that the Township denied him due process by terminating his Heart and Lung benefits and sick leave before giving him a hearing. Finally, Chirico claimed that his post-termination hearing deprived him of due process because the Board of Supervisors conducting it knew of and acquiesced in the Township manager's decision prior to commencement of the hearings. The county court affirmed the decision of the Board. Therefore, it considered and rejected these arguments.

On appeal from the Court of Common Pleas, Chirico argued that the Township denied him a pre-termination hearing as required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The Commonwealth Court

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[2] Chirico claims that his issues were not, in fact fully litigated, "especially in light of the later-discovered participation and acquiescence of the individual Defendant Supervisors in those decisions prior to the hearing." If there has been newly-discovered evidence, which could not have been found earlier through due diligence of the parties, this situation may, at the judge's discretion, be grounds for relief from judgment, under Fed.R.Civ.P.60(b). The record does not reflect that such relief was ever attempted in the state court. Chirico may not use his failure to traverse available procedural avenues as a reason to open new channels in the federal courts for another trial on essentially the same issues.

of Pennsylvania, however, expressly found that Comunale's letter to Chirico of January 18, 1991 offered him the opportunity for a hearing "prior to stoppage of your pay and benefits if you so request." The court also expressly found that there was no evidence in the record that the Board who terminated Chirico had participated in the initial decision. Therefore, it concluded that there was no evidence of a denial of due process.

In this proceeding, Judge Katz carefully and thoroughly analyzed the issues of bias, due process and equal protection and held that they had been adjudicated in the Township's favor in state court and are now barred. In addition, the district court noted that the Township afforded Chirico the opportunity for a hearing prior to stoppage of his pay or benefits. This precludes any argument that the Township violated his due process rights because he did not receive a hearing. We agree with this analysis of Chirico's claims. These decisions of the state court cannot be re-litigated in the federal forum.

B. Claim Preclusion

In addition, Chirico cannot now litigate issues which could have been raised in the state action and were not. This is the doctrine of claim preclusion, formerly known as res judicata. In *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), this court applied the doctrine to a fact pattern remarkably similar to Chirico's. The Town Council discharged Gregory, a police officer in the town of Lower Saucon, Pennsylvania, for cause. He argued, however, that his discharge had been in retaliation for his political activities in violation of the First Amendment. Gregory

filed a complaint in a state court against the Council members in their individual capacities, claiming: (1) a violation of the Sunshine Law; (2) failure to follow township discipline policy; (3) insufficient evidence; (4) failure to notify the plaintiff of the consequences of his actions; and (5) bias on the part of the Council members. *Gregory v. Chehi*, at 114. The state court affirmed the Council's decision. *Id.*

Gregory then filed a complaint in federal court, alleging a conspiracy between the defendants to deprive him of his due process rights. He raised his First Amendment claim at this proceeding, as the state court judge had not mentioned it. The court held that, even though the issue had not been "fully and fairly litigated" in the prior proceeding, it was nonetheless barred by the doctrine of res judicata. The court determined that plaintiff's two complaints stemmed from the same transaction or claim[3]. The essence of each cause of action, said the Court of Appeals, "is that he [Gregory] was unlawfully discharged from his employment." *Gregory*, at 118. The federal theories for the discharge could have been advanced in the state action. Since they were not, Gregory could not now re-open the issues by recasting them in federal terms. He was barred. See, Restatement (Second) of Judgments, § 25 (1), comment e ("A given claim may find support in theories or grounds arising from both state and federal

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[3] Under Pennsylvania law, claim preclusion requires four elements, identity of subject matter, identity of cause of action, identity of parties to the action and identity of capacity of the parties, *Duquesne Slag Products Co. v. Lench*, 415 A.2d 53, 56 (Pa. 1980).

law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.")

Chirico is in the same position. His federal claims are for denial of his due process rights under § 1983 and conspiracy to deprive him of his rights in violation of § 1985. As discussed above, the due process claim was decided against him. As for the conspiracy count, the court in *Gregory* held specifically that "claim preclusion may not be evaded simply by adding allegations of conspiracy to the very same activity challenged in the first action." *Gregory*, at 118. The conspiracy claim is indistinguishable from the previous cause of action and is therefore barred. The district court entered summary judgment for defendants on all of Chirico's federal claims, noting that these issues are "inextricably tied to the other matters presented in the state court, which were fully and fairly adjudicated against Chirico." We agree.

Chirico argues that his complaint in the instant case against the defendants in their individual capacities is not barred, because they were not parties to the state court action. Claim preclusion does require identity of both parties to the action; issue preclusion, however, may be asserted defensively by one not a party to the first action, as long as the person against whom it is asserted was a party in the previous case. *See, Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979). In *Gregory*, the court determined that the state court suit had been against the defendant Council members in their official capacities.

Therefore, the court permitted a suit against the council members as individuals. *Gregory*, at 120, *see also, Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993) (prior court action against a municipality does not meet identity of parties test for subsequent federal suit against officials in their individual capacities).

Chirico argues that his suit, as well, should be allowed to proceed against the defendants individually. However, Chirico's situation is distinguishable. In *Gregory*, the court allowed the action to proceed only as to Gregory's First Amendment claim, a claim that had been expressly reserved from decision by the state court. In *Edmundson* and in *Kelly v. City of Philadelphia*, 552 F.Supp. 574 (E.D.Pa. 1982), also cited by Chirico for the proposition that his suit against the individuals may proceed, the courts held that such claims were not barred by prior agency decisions that had not been reviewed by a court. In contrast, all of Chirico's claims were fully litigated, and were heard before a Pennsylvania state trial and appellate court. The defendants as individuals can defensively use the state court finding that Chirico was afforded due process. The state court held that Comunale's letter of January 18 notified Chirico of the opportunity for a pre-termination hearing before stoppage of any pay or benefits, but Chirico failed to request such a hearing. The plaintiff may not now re-litigate endlessly by bringing separate actions for each benefit terminated[4].

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[4] Judge Katz also held that the members of the Board of Supervisors were entitled to summary judgment in their individual capacities because the plaintiff sought redress against them in these proceedings for their actions while they

III.

Having determined that all Chirico's claims are barred by res judicata or collateral estoppel, we need not reach the issue of whether the town manager and the individual supervisors enjoy immunity from suit for their actions. All of Chirico's claims are barred by the earlier state court judgments, and cannot be brought again in the federal forum.

Accordingly, the judgment in favor of the appellees will be affirmed. Costs taxed against the appellants.

TO THE CLERK:

Please file the foregoing opinion.

s/Max Rosenn
Circuit Judge

[stamped]
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presided over Chirico's post-termination hearing. The court held that in conducting such hearing, the Supervisors acted in a judicial capacity and were absolutely immune.

The court also held that the individual defendants and the Township manager were entitled to qualified immunity with respect to plaintiff's federal claims because there was no issue concerning the competence of their action or any knowing violation of the law in dealing with Chirico's failure to report for duty and his ultimate termination. The court found no evidence whatsoever to support the allegation of malice.

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1001

JAMES J. CHIRICO; DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OF POLICE,

Appellants

v.

TOWNSHIP OF NEWTOWN; EDWARD M. CORSE, an adult individual; LARRY M. COMUNALE, an adult individual; PAUL E. RUSSELL, an adult individual; STEWART SPAHR, an adult individual; SUZANNE MATHES, an adult individual; EDWIN COE WILLIAMS, an adult individual a/k/a E. COE WILLIAMS; DELAWARE COUNTY ASSOCIATION OF MUNICIPALITIES

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. No. 92-cv-04956
District Judge: Honorable Marvin Katz

Submitted Under Third Circuit LAR 34.1(a)
October 11, 1995

Before: GREENBERG, LEWIS, and ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on October 11, 1995.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court filed December 6, 1994, be and the same is hereby affirmed.

Costs taxed against appellants.

Attest:
s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: OCT 17 1995

APPENDIX C – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 5, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 92-4956

JAMES CHIRICO and DELAWARE COUNTY LODGE NO. 27, FRATERNAL ORDER OR POLICE,

Plaintiffs,

v.

TOWNSHIP OF NEWTOWN, et al.,

Defendants.

MEMORANDUM AND ORDER

AND NOW, this 5th day of December, 1994, upon consideration of Plaintiffs' Motion For Partial Summary Judgment and Motion For Summary Judgment Filed By The Defendants, Township Of Newton, Edward M. Corse, Larry M. Comunale, Paul E. Russell, Stewart Spahr, Suzanne Mathes, Edwin Coe Williams A/K/A E. Coe Williams and the parties' respective responses thereto, it is hereby **ORDERED** that Plaintiffs' Motion is **DENIED** and Defendants' Motion is **GRANTED** in part and **DENIED** in part.

I. Background

On November 10, 1990, plaintiff James Chirico ("Chirico"), then a veteran police officer of defendant Township of Newtown ("Newtown"), responded to a medical emergency call with a fellow officer. In the course of his duties, Chirico performed CPR on an adult male (the "Victim") and was exposed to blood and other bodily fluids of the Victim. Later that day, Chirico was advised that the Victim was HIV positive and might have AIDS. On November 12, 1990, Chirico underwent a blood test to determine whether he had contracted HIV as a result of his encounter with the Victim. On November 12 and 13, 1990, Chirico was assigned days off with pay by Newtown and he returned to work on November 14, 1990. Later in November, Chirico was told that his blood test showed no traces of HIV or AIDS.

On either November 26 or 27, 1990 Chirico called in sick and thereafter did not return to work. Chirico then informed his superiors that he was emotionally unable to report for duty. On November 28, 1990 Chirico consulted with a psychiatrist. Chirico asserts that his inability to work and his need for treatment by a psychiatrist were the result of emotional problems he experienced as a result of his belief that he may have contracted HIV. On November 28, 1990 Chirico received psychiatric treatment at Fitzgerald Mercy Hospital and was advised that he could return to work. On November 30, the Township Manager of Newtown, defendant Larry M. Comunale ("Comunale"), advised Chirico that his absence from work would be charged against his accumulated sick leave. Until February 14, 1991, Newtown permitted Chirico to take sick leave and continue all benefits of

employment pursuant to the operative collective bargaining agreement between plaintiff Delaware County Lodge No. 27, Fraternal Order of Police ("Lodge No. 27") and Newtown.

In January 1991, Chirico began a series of psychiatric treatments under the direction of Louis B. Lipschultz, M.D. By letter of January 18, 1991, the Township Manager informed Chirico that the Victim had also tested negative for HIV and AIDS. That letter also formally reiterated Newtown's demand that Chirico provide a "certificate of disability from an M.D." and requested that he submit to an examination by Dr. Wolfram Rieger, a doctor selected by Newton to assess Chirico's workman's compensation status.[1] The letter also stated:

> You may have a hearing before the Board of Supervisors prior to the stoppage of your pay and benefits if you so request within ten days hereof.

By letter of January 22, 1991, Chirico, through counsel, informed Newtown that he would submit to an examination by Dr. Rieger. The letter also requested a certificate of disability form. In response to this request Newtown informed Chirico that no standard certificate of disability form was used by the township. On February 1, 1991, Dr. Rieger examined Chirico and opined that Chirico could return to work without restrictions or limitations. In response, Chirico then provided Newtown with a short note from Dr. Lipschultz which stated:

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[1] It appears that Chirico did not pursue a claim for workman's compensation benefits.

> Officer Jim Chirico is currently under my medical care. To date, he remains disabled and unfit for duty.

On February 12, 1991, Newtown's Township Manager advised Chirico, by letter, that: (1) he had failed to provide an sufficient certificate of disability; (2) he could not continue on sick leave; and (3) he was to report for duty on February 14, 1991.

On February 19, 1991, the Township Manager advised Chirico that he could be suspended by the Board of Supervisors (the "Board") without pay as of February 14, 1991 because he did not report on that date. On February 21, 1991, the Township Manager advised Chirico, by letter, that his unexcused absence would be reconsidered if Chirico provided Newtown with a report justifying his continued absence from work. The February 21, 1991 letter also informed Chirico that "unless we approve an acceptable report by March 1, 1991, we will consider you a voluntary quit . . . effective February 14, 1991."

Chirico responded to Newtown's request by providing a more detailed report dated February 21, 1991, from Dr. Lipschultz. On April 15, 1991, Newtown informed Chirico, by letter, that Dr. Lipschultz' February 21, 1991 report was unacceptable and that Newtown accepted Chirico's voluntary quit from the police department as of February 14, 1991. The letter also informed Chirico that if he wished to have a post-termination hearing before the Board, he was to inform the Township Manager before April 26, 1991.

Chirico demanded a hearing before the Board. Chirico also filed a mandamus action against Newtown in Delaware County Common Pleas Court claiming that he was disabled as the result of a duty-related incident and that he was therefore entitled to benefits under the Pennsylvania Heart and Lung Act ("HLA"), 53 P.S. §§ 637-38. The Common Pleas Court remanded Chirico's claim for HLA benefits to the Board for consideration as a component of the pending post-termination hearing.

On January 2, 1992, the Board, after a lengthy hearing, issued an adjudication affirming Chirico's termination as both: (1) a "voluntary quit" and (2) an appropriate disciplinary response for Chirico's dereliction of his duty to report to work as ordered. *See* Def. Mot. Summ. J. Ex. A. The Board's adjudication also denied Chirico's HLA benefits claim. Chirico appealed both determinations to the Court of Common Pleas claiming broadly: (1) that his due process and equal protection rights had been violated by Newton's failure to hold a pre-termination hearing as required by *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985); and (2) that the Board's post-termination hearing and adjudication were biased in a variety of ways including *per se* bias as recognized by *Copeland v. Township of Newtown,* 608 A.2d 601, because the Board members who decided to terminate Chirico participated in the post-termination hearing. *See* Def. Resp. Ex.A at 14. The Court of Common Pleas upheld Chirico's termination and denial of benefits. *Chirico v. Township of Newtown,* (No. 91-7954, filed December 2, 1992); *Chirico v. Township of Newtown,* (No. 92-295, filed December 2, 1992). Chirico appealed these decisions to the Commonwealth Court of Pennsylvania.

On August 26, 1992, prior to the decision of the Commonwealth Court, Chirico and Lodge No. 27 initiated the instant civil rights action against Newtown, the Township Manager, the members of the Board and the Delaware County Association of Municipalities.[2] In the instant action, plaintiffs claim that in terminating Chirico the defendants:[3] (1) violated Chirico's federal rights protected by 42 U.S.C. § 1983 including Chirico's procedural and substantive due process rights (Comp. at 6-23, 25-28) and Chirico's equal protection rights (Comp. at 24-25); and (2) committed various state law offenses, including tortious interference with contract and intentional infliction of emotional distress (Complaint at 28-41). After a pre-trial conference on December 4, 1992, this court determined that the instant action was related to the proceedings in Commonwealth Court and, by Order of December 4, 1992, placed the matter in civil suspense pending the completion of the related state court proceedings.

By Order and unreported decision of November 8, 1993, the Commonwealth Court affirmed both decisions of the Court of Common Pleas. *See* Def. Mot. Summ. J. Ex. C With respect to Chirico's due process claim, the Commonwealth Court held that *Loudermill* does not mandate a pre-termination hearing, but rather the "*opportunity* for

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[2] The Delaware County Association of Municipalities was later dismissed by stipulation of the parties.

[3] It appears that plaintiffs have sued the individual Defendants, the Township Manager and the members of the Board in both their official and individual capacities. *See Gregory v. Chehi*, 843 F.2d 111, 119 (3d Cir. 1988).

[a] hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 543. The Commonwealth Court than found that, by its letter of January 18, 1991, Newtown had offered Chirico an appropriate pre-termination hearing. *See infra* at 3. With respect to Chirico's claims of bias, the Commonwealth Court upheld the determinations below that Chirico's termination was not the result of bias and specifically noted: (1) there was no evidence in the record that the members of the Board who conducted Chirico's post-termination hearing participated in the Newtown's decision to terminate Chirico's employment;[4] and (2) Chirico's counsel did not argue bias in violation of Copeland at the hearing before the Board.

Chirico then sought review of Commonwealth Court's decision by the Supreme Court of Pennsylvania. The related state court proceedings were completed when the Pennsylvania Supreme Court denied Chirico's Petition for Allowance of Appeal by Order of September 17, 1994.

II. Cross-Motions For Summary Judgment

Plaintiffs' motion for partial summary judgment seeks judgment on Count I of the Complaint. The motion centers on Chirico's allegations that the defendants violated his procedural and substantive due process rights

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[4] The Commonwealth Court specifically found that the letter of April 15, 1991 deeming Chirico's actions a voluntary quit was signed by the Township Manager and in this regard "the record reveals that all correspondence and contact were with him alone."

when his employment and benefits were terminated on April 15, 1991. Specifically, plaintiffs' motion asserts that: (1) Chirico was deprived of a pre-termination hearing; (2) the defendants failed to follow procedures set forth in the police code; and (3) Chirico's work-related benefits (HLA benefits, sick leave and health insurance coverage) were terminated without due process. Defendants' motion seeks summary judgment on all plaintiffs' federal claims on the grounds of issue preclusion, claim preclusion, absolute immunity and qualified immunity. Defendants also seek summary judgment on plaintiffs' state law claims. Plaintiffs' response to defendants' motion argues:

1. The state court proceedings were flawed because all relevant evidence was not in the record and the state adjudicative bodies improperly weighed certain evidence, (Pl.Resp.at 11-12);

2. While Chirico was offered a pre-termination hearing with regard to employment, he was not offered such a hearing with regard to the attendant benefits of employment – sick leave and health insurance coverage – in violation of *Loudermill*, (*Id.* at 12-14); and

3. The instant claim that Chirico termination was the result of bias or prejudice on the part of Newtown's officials stemming from prior legal action by Chirico was not previously adjudicated and, therefore, is not subject to preclusion, (*Id.* at 14).

III. Discussion

Summary judgment is authorized by Federal Rule of Civil Procedure 56, which states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the non-moving party may not rely merely upon bar assertions, conclusory allegations or suspicions. *Fireman's Ins. Co. v. DeFrensne*, 676 F.2d 965, 969 (3d Cir. 1982). "Material" facts are those facts that might affect the outcome of the suit under the substantive law governing the claims made. An issue of fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party" in light of the burdens of proof required by substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986).

Defendants are entitled to summary judgment on plaintiffs' federal claims because plaintiffs' federal claims are barred by issue preclusion and claim preclusion. *See Rider v. Pennsylvania*, 850 F.2d 982 (3d Cir. 1988). In addition, plaintiffs' federal claims against the individual defendants, the Township Manager and the Board Members, in their personal capacities fail for the additional

and independent reasons that the Board Members are entitled to both absolute and qualified immunity and the Township Manager is entitled to qualified immunity. *See Mireles v. Waco*, 502 U.S. 9 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. Claim Preclusion and Issue Preclusion

Issue preclusion, otherwise known as collateral estoppel, bars re-litigation of an issue identical to that resolved in a prior action. Claim preclusion, often called res judicata, is broader in effect and prohibits reexamination not only of matters actually decided in the prior case, but also those that the parties might have, but did not, assert in that action.[5] *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993).

When a prior case has been adjudicated in state court, federal courts are required by 28 U.S.C. § 1738 to give full faith and credit to the state judgment and, in section 1983 cases, apply the same preclusion rules as the courts of that state. *Id.* Pennsylvania requires a concurrence of four conditions before claim preclusion can apply. The two actions must share an identity of the (1) thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued. *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir.

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[5] One of the prerequisites to invoking claim preclusion is that the same individuals or their privies are parties to the prior litigation. *Stevenson v. Silverman*, 417 Pa. 187 (1965). Here, it is clear that plaintiff, Delaware County Lodge No. 27, has no independent basis to assert the claims in the instant action and is therefore in privity with plaintiff Chirico.

1988) (*citing Duguesne Slag Products Co. v. Lench*, 415 A.2d 53, 56 (1980)). Under Pennsylvania law, the following conditions must exist before issue preclusion may be invoked: (1) The issue decided in the prior adjudication was identical with the one presented in the later action; (2) There was a final judgment on the merits; (3) The party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) The party against whom it is asserted had a full and fair opportunity to litigate the issues in question in the prior action. *Gregory*, 843 F.2d at 121 (*citing Safeguard Mut. Ins. Co. v. Williams*, 574 A.2d 664, 668 (1975)).

1. Newtown and the Individual Defendants in Their Official Capacity

Plaintiffs' federal claims against Newtown and the individual defendants in their official capacities are clearly barred by claim preclusion and issue preclusion.[6] *Gregory*, 843 F.2d at 120 (*citing Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690 n.65 (1978)).[7] Plaintiffs' allegations that Chirico's employment was terminated: (1) without due process; (2) in violation of his

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[6] Plaintiffs do not dispute that Lodge No. 27 has no independent basis to assert the claims in this action and therefore can be considered in privity with Chirico for purposes of issue preclusion and claim preclusion.

[7] In the claim preclusion context, governmental officials sued in their official capacities for action taken in the course of their duties are considered in privity with the governmental body. They may invoke a judgment in favor of the governmental entity as may that body itself. *Gregory*, 843 F.2d at 120 (*citing Mears v. Town of Oxford*, 762 F.2d 368, 371 n.3 (4th Cir. 1984)).

equal protection rights, and (3) as a result of bias on the part on Newtown's officials were adjudicated in defendant Newtown's favor in state court and are therefore clearly barred by claim preclusion. *Rider*, 850 F.2d at 988. Further, as an essential component of their decisions, the Board and the reviewing state courts unequivocally found that Chirico was provided a sufficient opportunity for a pre-termination hearing as required by *Loudermill*, and, consequently, Chirico's allegations of employment termination without due process are barred by issue preclusion.[8]

Plaintiffs' allegation that Chirico's civil right were violated because the defendants did not follow the procedures set forth in the police code is likewise barred by claim preclusion and issue preclusion. Chirico raised this exact contention in the state court proceedings and it was decided against him. The facts, as determined by the Board's adjudication, which was affirmed by the Court of Common Pleas and the Commonwealth Court, are that Chirico quit voluntarily and that he acted in neglect of duty by failing to report to work and therefore the procedures plaintiffs assert were violated were not applicable. Moreover, the claim could have been raised by Chirico and, therefore, is barred. *Rider*, 850 F.2d at 988.

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[8] In their response brief, plaintiffs argue against this conclusion by contending that newly discovered evidence and the state courts' unprincipled assessment of the evidence warrant re-litigation of Chirico's claims. Such contentions are insufficient to overcome claim preclusion and issue preclusion. *See Rider*, 850 F.2d at 988 (res judicata precludes parties whose action has reach a final judgment on its merits, from re-litigating issues "that were or could have been raised in that action").

Finally, the claim that plaintiffs' stress in their reply brief – that Chirico was deprived of HLA benefits, accumulated sick leave and health insurance coverage without due process – is also bared [sic] by claim preclusion and issue preclusion. First, the Board addressed these claims and held that Chirico was not entitled to: (1) health insurance or other benefits because he was a "voluntary quit;" (2) to HLA benefits and (3) to additional sick days. These holdings were affirmed by the two state appellate courts that reviewed them. Second, to the extent plaintiffs argue that Chirico's due process rights were violated because he did not receive a hearing prior to the termination of these benefits, issue preclusion estops plaintiffs from arguing that Chirico was not given the opportunity for a pre-termination hearing in accordance with Loudermill.[9] Third, even if the exact issue plaintiffs press today was not raised in the state court proceedings, plaintiffs' claim is barred by claim preclusion because it could have been raised in that action. *Rider*, 850 F.2d at 988.

2. The Individual Defendants in Their Personal Capacity

In *Gregory* and *Edmundson*, the Third Circuit reversed district court grants of summary judgment based on

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[9] The fact that Newtown's January 18, 1991 notice of an opportunity for a pre-termination hearing mentioned employment generally and did not specifically enumerate the attendant benefits of employment that would also be terminated does not raise a material issue of fact that Chirico was deprived of an opportunity for a pre-termination hearing with regard to employment benefits.

claim preclusion in favor of individual defendants in their personal capacities. In so holding, the Third Circuit found that when there is a prior state court action against a municipality the defense of claim preclusion does not inure to municipal employees sued in their personal capacities in a subsequent federal suit because the identity of the parties test is not met. *Edmundson*, 4 F.3d at 191; *Gregory*, 843 F.2d at 120. However, in so holding the Third Circuit recognized the availability of issue preclusion to municipal employees who, after a prior suit against their employer, are sued in their personal capacities in a subsequent federal suit.[10]

Here, plaintiffs' claims against the Township Manager and the members of the Board in their individual capacities are barred by issue preclusion. The identical issue pressed in this action of whether Chirico was granted sufficient and unbiased due process as required by *Loudermill* and *Copeland* was fully and fairly adjudicated against the plaintiffs in the prior state court proceeding and, therefore, is barred from being relitigated by issue preclusion. *Williams*, 574 A.2d at 668; *supra* at 11-13.

In addition, the narrow issue that plaintiffs' focus on

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[10] In both *Edmundson* and *Gregory* the Third Circuit found that issue preclusion did not bar the respective plaintiff's claims. In *Gregory*, the plaintiff's claim that was not barred was explicitly excluded from consideration in the prior proceeding. *Gregory* 843 F.2d at 113-114, 121. In *Edmundson*, the plaintiff's claim that was not barred was because the prior action that the district court gave preclusive effect was a judicially unreviewed agency decision. In the present action, none of the plaintiffs' claims were excluded from consideration in the prior proceedings and the prior proceedings were subject to thorough judicial review.

in their response as being "new" – the claim that the events surrounding Chirico's termination were the result of bias or prejudice on the part of Newtown's officials – is clearly barred. Plaintiffs' present claims of bias by the individual defendants in their personal capacities are barred by issue preclusion because: (1) the issue of bias was decided against Chirico in the state court proceedings, and (2) in those proceedings, Chirico was provided a full and fair opportunity to litigate that issue. *Williams*, 574 A.2d at 668. Moreover, this narrow issue of bias the plaintiffs now stress is inextricably tied to the other matters presented in the state court, which were fully and fairly adjudicated against Chirico, and therefore is barred by issue preclusion. *Gregory*, 843 F.2d at 121.

B. Absolute Immunity

The defendant members of the Board are also entitled to summary judgment in their individual capacity on the ground that they are immune from suit for their actions in a judicial capacity during Chirico's post-termination hearing. *See Brown v. Griesenaur*, 970 F.2d 431 (8th Cir. 1992). Plaintiffs' claims against the Board members center on the members' actions during Chirico's post termination hearing. During the hearing process the Board members' actions were essentially judicial or adjudicatory, as opposed to legislative or ministerial, and such actions are absolutely immune from suit under 42 U.S.C. § 1983. *Id.* at 437.[11] Because the instant action against the Board members seeks redress for their actions while they presided over Chirico's post-termination

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[11] Immunity analysis focuses on the nature of the function performed, not the identity of the actor who performed it. *Forester v. White*, 484 U.S. 219, 229 (1988).

hearing, the defendant Board members are entitled to absolute immunity and a corresponding grant of summary judgment.

C. Qualified Immunity

The individual defendants, the Township Manager and the Board members, are entitled to qualified immunity and a corresponding grant of summary judgment with respect to plaintiffs' federal claims. Plaintiffs argue that qualified immunity is not applicable because *Loudermill* clearly establishes Chirico's right to a pre-termination hearing and qualified immunity is not applicable when defendant municipal officials act with malice. Pl.Resp.at 19-21.

Qualified immunity insulates state actors from personal liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, the ultimate issue is whether "reasonable officials in the defendants position at the relevant time could have believed, in light of the decided case law, that their conduct would be lawful." *Good v. Dauphin County Social Servs. for Children and Youth*, 891 F.2d 1097, 1092 (3d Cir. 1989). With regard to the application of qualified immunity in the local government context, the Third Circuit has recently stated:

> When considering whether members of local legislative bodies are entitled to immunity from suit, we have recognized that there is a compelling need for such a protective doctrine because

> of the severe chilling effect numerous suits for damages would have on prospective officials. We also believe that adherence to the immunity doctrine is necessary in order to allow elected or appointed officials to make intelligent . . . decisions without constant fear of litigation infecting the decision-making process.

Acierno v. Cloutier, Nos. 93-7456 & 7617, slip op. at 33 (3d Cir. Oct. 18, 1994) (en banc (citations omitted).[12]

Here, there is simply no material issue of fact that the defendants acted incompetently or in knowing violation of the law in dealing with Chirico's failure to report for duty and his ultimate termination. Plaintiff's contentions regarding the defendants' alleged *Loudermill* violations were put to rest by the state court proceedings. In addition, the record clearly demonstrates that the individual defendants did offer Chirico pre-and post-termination due process and, therefore, putting aside the prior proceedings, there is no issue of material fact with regard to whether the individual defendants violated Chirico's clearly established due process rights.

Finally, plaintiffs' argument that the individual defendants acted with malice and are therefore not entitled to qualified immunity fails. First, plaintiffs cite no evidence in the record to support this contention. Instead,

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[12] The Third Circuit summarized the doctrine of qualified immunity as follows:

> Thus, the doctrine of qualified immunity protects the action of municipal officials except when they act in a "plainly incompetent" manner or when they "knowingly violate the law."

Id. (citations omitted).

they simply reiterate the contentions in the Complaint. This is insufficient to preclude summary judgment. *See Fireman's Ins. Co. v. DeFrensne*, 676 F.2d 965, 969 (3d Cir. 1982). Second, an independent review of the record uncovers no evidence of deliberate conduct in violation of Chirico's clearly established constitutional rights. The individual defendants are entitled to qualified immunity with regard to Chirico's federal claims.

D. State Claims

There are no viable federal claims in the instant action. On balance, considerations of judicial economy, convenience and fairness to the litigants do not support the exercise of supplemental jurisdiction over plaintiffs' state law claims. *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1284 (3d Cir. 1993); 28 U.S.C. § 1367. No trial on the plaintiffs' federal claims is necessary. The state law claims may raise complex state law issues. Accordingly, the plaintiffs' state law claims will be dismissed without prejudice. 28 U.S.C. §§ 1367(c)(1), (3).

BY THE COURT:

s/ Marvin Katz
MARVIN KATZ, J.

ENTERED: 12-6-94
CLERK OF COURT

APPENDIX D – MEMORANDUM OPINION OF THE PA COMMONWEALTH COURT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JAMES CHIRICO,	:	
Appellant	:	No. 2675 C.D. 1992
	:	No. 2676 C.D. 1992
v.	:	ARGUED: October 4, 1992
TOWNSHIP OF NEWTOWN	:	

BEFORE:
HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE CHARLES A. LORD, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE LORD FILED: November 8, 1993

James Chirico appeals from a decision of the Court of Common Please of Delaware County which affirmed two decisions of the Board of Supervisors of Newtown Township. The first decision denied heart and lung benefits to Chirico. The second decision upheld the termination of Chirico's employment.

On November 10, 1990, Chirico, a police officer of Newtown Township for twenty-three years, responded to a medical emergency call. While administering emergency CPR to a male individual, who appeared unconscious and in distress, Chirico was "sprayed" with blood and other body fluids from the victim. Later that day, information was conveyed to Chirico that the victim was

HIV positive or had AIDS. Two days later, Chirico was obliged to undergo a blood test to determine if he had contracted the AIDs virus as a result of his exposure to the blood and body fluids of the victim. The blood test results indicated that Chirico was not positive for the AIDS virus. Likewise, blood from the alleged AIDS-infected victim was tested and found to be negative for the AIDS virus. Chirico was advised of the victim's test results on January 18, 1991.

Following the incident, Chirico was assigned two days off with pay by the Chief of Police and then returned to duty. For approximately the next two weeks, Chirico experienced a variety of emotion-related symptoms and on November 27, 1990 advised that he was unable to report for duty because of his emotional condition. The following day Chirico sought emergency psychiatric treatment at the Fitzgerald Mercy Psychiatric Crisis Center. Thereafter, Chirico did not return to duty.

In January, 1991, Chirico sought psychiatric treatment and, after an initial evaluation, began treatment with Louis B. Lipschutz, M.D.

Aware that Chirico was seeking psychiatric treatment because his "mind was messed up" and that he was unable to work because of the incident (Notes of Testimony, Township Board Hearing, August 27, 1991, p. 43), the township manager issued Chirico a letter dated January 18, 1991 directing him to provide a "certificate of disability from an M.D." and to report for an examination by a physician, Dr. Rieger, selected by the Township's workman's compensation insurer. (Exhibit T-5, board

hearing, 8/27/91) Chirico's attorney notified the township manager in a letter dated January 22, 1991 what Chirico would appear for the scheduled examination by Dr. Rieger and requested a copy of any form of disability certificate used by the Township (Exhibit T-6, board hearing, 8/27/91). The township manager confirmed that there was no "specific form" of certificate of disability utilized by the Township. Accordingly, Chirico provided the Township with a note written by his treating psychiatrist which stated:

> "Officer Jim Chirico is currently under my medical care. To date, he remains disabled and unfit for duty."

However, on February 12, 1991, the township manager issued a letter to Chirico advising that he had no sick leave available and directing him to report for duty on February 14, 1991. (Exhibit T-1A, board hearing, 5/22/91).

On February 19, 1991, the township manager issued another letter to Chirico advising that he was going to recommend that Chirico be "suspended without pay as of February 14, 1991" because he did not report for duty on that date. (Exhibit T-1C, board hearing, 5/22/91).

On February 21, 1991, the township manager issued another letter to Chirico advising, inter alia, that the Township was willing to reconsider his unexcused absence and that Chirico "must provide the Township with a report acceptable to us justifying your absence from work" and that "unless we approve an acceptable report by March 1, 1991 we will consider you a voluntary quit . . . effective February 14, 1991." (Exhibit T-1D).

Chirico responded by providing a three-page report dated February 21, 1991 from his treating physician, after which his pay and other employment benefits continued.

On April 15, 1991, the township manager issued a final letter to Chirico, notifying him that the report from his treating physician was "unacceptable" and that his employment, as previously threatened, was terminated as of February 14, 1991. Chirico demanded a hearing before the Board of Supervisors upon the termination of his employment.

Chirico also claimed that his disability arose from a duty-related incident and filed an action in mandamus in common pleas court, seeking to compel the Township to provide benefits mandated by the Act of June 28, 1935, P.L. 477, *as amended*, 53 P.S. §§ 637-38, known as the Heart and Lung Act ("HLA"). The Court remanded Chirico's claim for HLA benefits to the Township's Board of Supervisors for consideration as part of the local agency proceedings on Chirico's termination of employment.

After extended hearings, on January 2, 1992, the Board of Supervisors issued its adjudication, affirming Chirico's termination first, as a "voluntary quit," and, second, as a matter of discipline because his failure "to report to work amounted to neglect of duty under the Police Tenure Act."

In addition, the board denied Chirico's claim for HLA benefits. Chirico appealed both adjudications to the Court of Common Pleas, which affirmed the denial of HLA benefits, *Chirico v. Township of Newtown*, (No.

91-7954, filed December 2, 1992) and upheld his termination. *Chirico v. Township of Newtown*, (No. 92-295, filed December 2, 1992).

The first argument advanced by Chirico is that he was deprived of a pre-termination hearing constitutionally required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Specifically, *Loudermill* held:

> An essential principle of due process is that a deprivation of life, liberty, or property "be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." This principal requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.

Id. at 542-43. (citations omitted, footnotes omitted; emphasis in original).

Loudermill further held that, even if an employee is later given a full administrative hearing, such a hearing does not satisfy the constitutionally essential pre-termination hearing.

Initially, we were somewhat hampered in our review of this question because the township paid little or no attention to this argument, either in its statement of facts or in the body of its brief. However, a reading of the record reveals that the January 18, 1991 letter sent by the township manager is conclusive of this issue.

We reproduce that letter in its entirety.

Dear Mr. Chirico:

We are in receipt of your attorney's letter of January 14, 1991. Please advise the writer immediately if you will provide the Township with a Certificate of Disability from an M.D., and if you will see Dr. Rieger on February 1, 1991 at 2:00 P.M. (see my letter of January 9, 1991 enclosed).

You may have a hearing before the Board of Supervisors *prior to stoppage of your pay and benefits if you so request within 10 days hereof.*

Also enclosed are the result of the tests conducted on Mr. Kazanjian at Haverford Community Hospital.

(emphasis added).

Thus, the Township Manager unequivocally offered a pre-termination hearing to Chirico, but he never requested such a hearing. *Loudermill* requires no more than an "opportunity for [a] hearing appropriate to the nature of the case" *Id.* at 543.

This same letter and the failure of Chirico or his counsel to demand a hearing also supply complete answers to Chirico's argument that a violation of Section 814 of the HLA, 53 P.S. § 814, occurred. That statutory provision requires a hearing within ten days *upon demand.*

Chirico's second argument is based upon this Court's decision in *Copeland v. Township of Newtown,* ___ Pa. Commonwealth Ct. ___, 608 A.2d 601 (1992) which in turn relied upon *Lyness v. State Board of Medicine,* ___ Pa. ___, 605 A.2d 1204 (1992). It is an argument in which bias or the appearance of impropriety is alleged because the same person or persons who fired Chirico participated in

his hearing. In *Copeland*, this Court had before it a case in which the *board of supervisors* suspended a policeman and than heard his appeal. There is no evidence in this record that the supervisors participated in any fashion in the initial decision on April 15, 1991 deeming Chirico's actions a voluntary quit.[1] Furthermore, we have examined the voluminous hearing notes of the proceeding before the supervisors, and nowhere does Chirico's counsel argue bias on the part of the supervisors.

The above analyses of *Loudermill* and *Copeland* apply equally to Chirico's claim under the HLA, and we find no error in connection with that claim. In addition, the Township afforded Chirico a full hearing before the board of supervisors as provided in *Sidlow v. Township of Nether Providence*, ___ Pa. Commonwealth Ct. ___, 621 A.2d 1105 (1993), and decided against him, with substantial evidence supporting the Township's action and no reliance on Chirico's workmen's compensation claim save for a tangential reference to the decision there. *See Civil Service Commission of Sewickley Borough v. Goldman*, ___ Pa. Commonwealth Ct. ___, 621 A.2d 1142 (1993).

The remaining arguments concern the record and, for the most part, are attempts to convince this Court, first, that Chirico's physician, Dr. Lipschutz, was more credible than the Township's physician, Dr. Rieger; and second, that Chirico was not working at a golf course at the time he claimed he was disabled for police duty. It is not the

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[1] The letter of this date uses the words "the Township" in several instances, which is unfortunate. However, the letter was signed by the township manager and the record reveals that all correspondence and contact were with him alone.

function of this Court either to weigh the evidence or make determinations of credibility. There was substantial evidence to support the findings of the board of supervisors that Chirico was not disabled, and that he was doing some work at the golf course and that he refused to come to work when ordered.

Finally, Chirico argues he was not given the requisite notice of the reasons for the actions against him before the board's hearing. Given the correspondence and conversation between the township manager and Chirico and his counsel, it cannot be argued that Chirico was unaware that the charges to be considered by the board were to be based on this evidence – that Chirico failed to provide an acceptable certification of his disability or other excuse for his absence from work as of February 14, 1991. Therefore, regardless of whether his failure to report to work was finally termed by the board as a voluntary quit or, alternatively, neglect of duty, Chirico was properly notified.

Affirmed.

/s/ Charles A. Lord
CHARLES A. LORD,
Senior Judge